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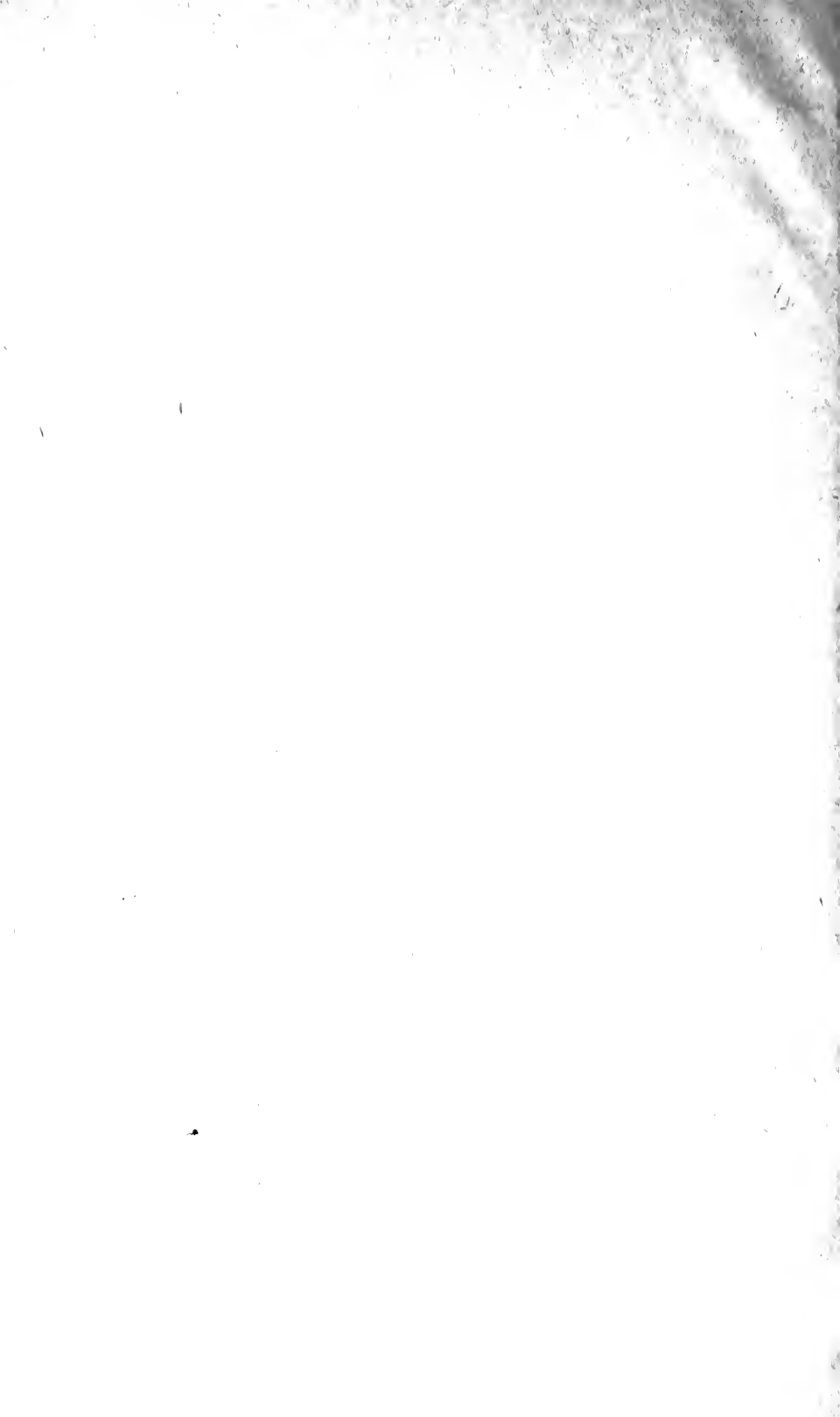
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N. 2819

No. 13658

United States
Court of Appeals
For the Ninth Circuit.

ser. vol. 2820

MILTON H. OLENDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Three Volumes
Volume I
(Pages 1 to 496)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

MAY 14 1953

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorney for Appellant.

CHAUNCEY TRAMUTOLO, ESQ.,
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ROBERT J. DREWES, ESQ.,
Assistant United States Attorney,
Attorneys for Appellee.



United States District Court, Northern District of
California, Southern Division

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

MILTON H. OLENDER,
Defendant.

INDICTMENT

Violation of Section 145 (b), Internal Revenue
Code; Title 26 U.S.C., Section 145 (b), Eva-
sion of Income Tax.

Penalty: Imprisonment not to exceed five years, or
fine not to exceed \$10,000, or both, on each
count, with costs of prosecution.

First Count

The grand jury charges:

That on or about the 15th day of March, 1946, in
the Northern District of California, Milton H.
Olender, late of Oakland, California, did wilfully
and knowingly attempt to defeat and evade a large
part of the income tax due and owing by him to the
United States of America for the calendar year
1945, by filing and causing to be filed with the Col-
lector of Internal Revenue for the First Internal
Revenue Collection District of California, at San
Francisco, California, a false and fraudulent income
tax return wherein he stated that his net income for
said calendar year, computed on the community-
property basis, was the sum of \$21,096.38, and that
the amount of tax due and owing thereon was the

sum of \$7,931.86, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$34,553.69, upon which said net income he owed to the United States of America an income tax of \$16,478.92.

Second Count

The grand jury charges:

That on or about the 15th day of March, 1946, in the Northern District of California, Milton H. Olender, late of Oakland, California, who during the calendar year 1945 was married to Bessie B. Olender, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Bessie B. Olender to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, California, a false and fraudulent income tax return for and on behalf of the said Bessie B. Olender, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of \$19,971.23, and that the amount of tax due and owing thereon was the sum of \$7,563.89, whereas, as he then and there well knew, her net income for the said calendar year, computed on the community-property basis, was the sum of \$33,428.53, upon which said net income there was owing to the United States of America an income tax of \$16,038.82.

In violation of Section 145 (b), Internal Revenue Code; 26 U.S.C., Section 145 (b).

Third Count

The grand jury charges:

That on or about the 15th day of March, 1947, in the Northern District of California, Milton H. Olender, late of Oakland, California, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, California, a false and fraudulent income tax-return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of \$12,514.81, and that the amount of tax due and owing thereon was the sum of \$3,054.85, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of \$23,778.72, upon which said net income he owed to the United States of America an income tax of \$8,368.44.

In violation of Section 145 (b), Internal Revenue Code; 26 U.S.C., Section 145 (b).

Fourth Count

The grand jury charges:

That on or about the 15th day of March, 1947, in the Northern District of California, Milton H. Olender, late of Oakland, California, who during the calendar year 1946 was married to Bessie B. Olender, did wilfully and knowingly attempt to defeat and

evade a large part of the income tax due and owing by the said Bessie B. Olender to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, California, a false and fraudulent income tax return for and on behalf of the said Bessie B. Olender, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of \$10,999.81, and that the amount of tax due and owing thereon was the sum of \$2,507.94, whereas, as he then and there well knew, her net income for the said calendar year, computed on the community-property basis, was the sum of \$22,263.71, upon which said net income there was owing to the United States of America an income tax of \$7,553.94.

In violation of Section 145 (b), Internal Revenue Code; 26 U.S.C., Section 145 (b).

A true bill.

/s/ SIDNEY H. KESSLER,

Foreman.

/s/ CHAUNCEY TRAMUTOLO,

United States Attorney.

Approved as to form:

/s/ R.J.D..

Presented in open court and Ordered [Endorsed]:
Filed February 27, 1952.

[Title of District Court and Cause.]

MINUTES OF THE COURT—MARCH 11, 1952

This case came on regularly this day for arraignment. Robert J. Drewes, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendant, Milton H. Olender, was present in proper person and with his attorney, John V. Lewis, Esq.

On motion of Mr. Drewes, the defendant was called for arraignment. Defendant stated his true name to be as contained in indictment. Mr. Lewis waived the reading of the indictment and advised the Court that the defendant had heretofore received copy. The substance of the charge was stated to defendant and defendant stated that he understood the charge against him.

After hearing counsel, ordered case continued to April 8, 1952, to plead.

[Title of District Court and Cause.]

MINUTES OF THE COURT—APRIL 8, 1952

This case came on regularly this day for entry of plea. Robert J. Drewes, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendant, Milton H. Olender, was present in proper person and with his attorney, John V. Lewis, Esq.

The defendant was called to plead and thereupon said defendant entered a plea of "Not Guilty"

to the indictment filed herein against him, which said plea was ordered entered.

After hearing counsel, ordered case continued to May 6, 1952, to be set for trial.

[Title of District Court and Cause.]

MINUTES OF THE COURT—SEPT. 19, 1952

This case came on regularly this day for further trial, the parties hereto and the jury impaneled herein being present.

* * *

In the absence of the jury, the Court discussed with counsel the letter of Dr. Jesse O. Halpern on behalf of George Goodman, which had been presented to the Court by Mr. Drewes. It is Ordered that the letter be made a part of the record.

The United States thereupon rested its case.

In the absence of the jury, Mr. Lewis made objection to the net worth value approach in this case. Ordered objection overruled.

Mr. Lewis renewed his objection to the testimony of Charles R. Ringo, which objection was Ordered overruled.

Mr. Lewis' motions to strike the testimony of Charles R. Ringo and for judgment of acquittal were Ordered Denied.

* * *

[Title of District Court and Cause.]

MINUTES OF THE COURT—SEPT. 22, 1952

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed.

* * *

Mr. Hagerty made a motion to strike certain of the testimony of defendant's witness, S. E. Reinhard, which motion was ordered granted.

Mr. Hagerty made a motion for a mistrial based on a charge of misconduct on the part of Mr. Drewes and that Mr. Drewes asked a prejudicial question of defendant's witness, S. E. Reinhard, which motion was Ordered denied.

Upon stipulation that Monroe Friedman would testify to what is set forth in his affidavit, marked as Defendant's Exhibit D, in event he were called to testify, Ordered that the subpoena issued therein be discharged.

In the absence of the jury, Mr. Hagerty and Mr. Drewes discussed with the Court the properness of asking certain types of questions of character witnesses.

In the absence of the jury, Mr. Hagerty re-offered Defendant's Exhibit F, heretofore marked for identification, said exhibit being introduced in evidence. Mr. Drewes objected thereto. After hearing counsel thereon, the Court reserved its ruling.

* * *

[Title of District Court and Cause.]

MINUTES OF THE COURT—SEPT. 23, 1952

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed.

In the absence of the jury the following took place:

Mr. Drewes further advanced his contention that the Government is entitled to ask a certain type of question of character witnesses. After discussion by Mr. Drewes and Mr. Hagerty, Mr. Drewes thereupon withdrew his insistence thereon.

Mr. Drewes and Mr. Lewis then discussed with the Court certain items of the stipulation marked U. S. Exhibit No. 15.

Mr. Drewes renewed his motion to strike the testimony of defense witness, Hiram Lorenzen, which motion was Ordered denied.

The Court sustained Mr. Drewes' previously made objection to the introduction into evidence of Defendant's Exhibit F, heretofore marked for identification.

* * *

In the absence of the jury, Mr. Hagerty renewed his motion to strike the testimony of United States witness, Charles R. Ringo, on the ground of privilege between attorney and client. After hearing Mr. Hagerty and Mr. Drewes thereon, Ordered said motion denied.

* * *

[Title of District Court and Cause.]

MINUTES OF THE COURT—OCT. 8, 1952

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed.

In the absence of the jury, Mr. Hagerty made motions for mistrial:

(a) On the ground that admission of evidence as to Laura Foot is prejudicial;

(b) On the ground that admission of testimony of Charles R. Ringo violates privileged and confidential relationship between attorney and client.

Mr. Hagerty made additional motion to strike from the record the testimony of Seth L. Root in relation to the Goodman transaction in certain particulars.

Mr. Hagerty then made a motion for judgment of acquittal, and that failing, a motion for judgment of acquittal on the 1946 count.

After hearing counsel, it is Ordered that each and several of the motions be and the same are hereby denied.

Upon stipulation, it is Ordered that the Government's supplemental instruction be amended.

At the request of Mr. Drewes, the Court reopened presentation of evidence and admitted into evidence U. S. Exhibit No. 67, which had been offered at the close of the previous day's session but which had not been marked pending noncompliance with the

direction of the Court to have same signed and attested.

Mr. Drewes started his opening argument to the Court and jury on behalf of the United States.

* * *

[Title of District Court and Cause.]

MINUTES OF THE COURT—OCT. 10, 1952

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed.

After argument by counsel and the instructions of the Court to the jury, in the absence of the jury, counsel noted their exceptions to the instructions in certain particulars.

At 2:25 p.m. the jury retired to deliberate upon its verdict.

Mr. Hagerty then renewed his previously made motions for mistrial, to strike certain of the testimony, and for judgment of acquittal. Ordered each and several of said motions again denied.

At 5:17 p.m. the jury returned into Court to have certain portions of the transcript of testimony read to jury.

At 5:32 p.m. the jury again retired to further deliberate upon its verdict.

At 5:42 p.m. the jury returned into court and upon being asked if it had agreed upon a verdict, replied in the affirmative and returned the following verdict, which was ordered filed and recorded, viz:

“We, the Jury, find as to Milton H. Olender, the defendant at the bar, as follows:

Guilty as to Count 1;

Guilty as to Count 2;

Guilty as to Count 3;

Guilty as to Count 4.

/s/ “EDWARD C. CHEW,
“Foreman.”

The jury upon being asked if said verdict as recorded was its verdict, each juror replied that it was. Upon the Court's own motion, the jury was polled in compliance therewith, and the verdict was found to be unanimous.

The Court thereupon discharged the jury until further notice.

Mr. Hagerty then made motions for judgment of acquittal, notwithstanding the verdict, and for a new trial. The Court ordered that this case be continued to October 14, 1952, at 10 o'clock a.m. for hearing of the motions, and indicated that it would entertain Mr. Hagerty's motion for probation at that time.

In the interim Mr. Hagerty is to present formal motions for judgment of acquittal, notwithstanding the verdict, and for a new trial.

Ordered that Mr. Hagerty's motion that defendant be permitted to remain at large on bail previously posted be Granted.

[Title of District Court and Cause.]

MINUTES OF THE COURT—OCT. 14, 1952

This case came on regularly this day for hearing of motions for judgment notwithstanding verdict and for a new trial. Robert J. Drewes, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendant, Milton H. Olender, was present in proper person and with his attorneys, Emmett Hagerty, Esq., and John V. Lewis, Esq.

After hearing Mr. Hagerty and Mr. Drewes, Ordered motions for judgment notwithstanding verdict and for new trial be, and each is hereby, Denied.

On motion of Mr. Hagerty and with consent of Mr. Drewes, Ordered case referred to Probation Officer for investigation and report. John A. Sprague, Probation Officer, was present.

Ordered that defendant may remain at large on bail previously posted.

Ordered case continued to November 10, 1952, for judgment.

[Title of District Court and Cause.]

PLAINTIFF'S INSTRUCTIONS GIVEN

Dated: October 10, 1952.

/s/ GEORGE B. HARRIS,
United States District Judge.

Instruction No. 4

The possession of money alone is not sufficient to establish net taxable income. But evidence of the possession of money and the expenditure of money may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income.

United States v. Alphonse Capone,
56 F. 2d 927.

Instruction No. 5

You are instructed that when in the trial on charges of income tax evasion discrepancies between the defendant's returns and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict.

Bell v. United States,
185 F. 2d 302, 309 (CCA-4).

Instruction No. 6

If you find that the defendant had substantial taxable income for the years 1945 or 1946, or in both years, which he did not report on his income tax

return, then you will find that there was a substantial amount of tax due to the United States Government for those years by the defendant. The same principle applies to the counts involving Mrs. Betty Olender's taxes.

Instruction No. 7

If the defendant intentionally handled his income so as to avoid making an accurate record of such income and then filed a return which to his knowledge substantially understated his income, and the tax-evasion motive played any part in such conduct, the offense charged may be made out even though the conduct may also have served other purposes, such as concealment of other wrong doing.

Spies v. United States,
317 U.S. 492, 63 S. Ct. 364 (1943).

Instruction No. 8

The duty to file the return is personal, and it cannot be delegated. Bona fide mistakes should not be treated as false and fraudulent, but no man who is able to read and write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statement which he signs, whether prepared by him or somebody else.

United States v. Beard,
(U.S.D.C., Md.), Crim. No. 14454.

Instruction No. 9

You are instructed that it is not necessary for the Government to offer direct proof of wilfulness.

It is a rare case in which the defendant has said to a witness that he did certain acts with the purpose of evading his tax liabilities.

In making your decision, therefore, as to whether or not the acts tending to conceal defendant's true tax liability were wilful, you may consider all the circumstances of the case. You may infer wilfulness from the kind of evasion, if any, which you find defendant committed, from his opportunity to know the true amount of his net income, and from such other facts which point to the existence or nonexistence of the criminal state of mind in the defendant.

Paschen v. United States,

70 F. 2d 491 (CCA 7) at p. 498;

Maxfield v. United States,

152 F. 2d 593 (CCA-9) at p. 597.

Instruction No. 10

You are instructed that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observations and knowledge to things that are put out in the open and are obvious to him, and say, "I have no knowledge of those facts." He must exercise such intelligence as he has, and, if the evidence shows that he intended to conceal tax liabilities from the Government, then of course he was not acting in good faith. This question of intent is a question you must determine

for yourselves from a consideration of all the evidence.

United States v. Paschen,
70 F. 2d 491 (CCA-7, 1934).

Instruction No. 13

It is not necessary for the Government to prove that the defendant received income in the exact amount stated in the indictment or that the taxes due on his income were exactly as stated in the indictment. It is sufficient if you find beyond a reasonable doubt that the defendant received a substantial part of the income which he is charged with receiving and that he wilfully attempted to evade or defeat a substantial portion of the taxes alleged to have been due in the indictment.

Maxfield v. United States,
152 F. 2d 593 (CCA-9);

Rose v. United States,
128 F. 2d 623, 626 (CCA-10), 1942; certiorari denied (1942), 317 U.S. 651, 63 S.Ct. 47;

United States v. Schenck,
126 F. 2d 702, 704 (CCA-2), (1942);

Tinkoff v. United States,
86 F. 2d 868, 878 (CCA-7, 1937), certiorari denied (1937), 301 U.S. 689, 57 S.Ct. 795. Rehearing denied (1937), 301 U.S. 715, 57 S.Ct. 937.

Instruction No. 14

The gist of the offense charged in the indictment is wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt," as used in this law, involves two elements: (1) An intent to evade or defeat the tax, and (2) some act done in furtherance of such intent. The word "attempt" contemplates that the defendant had knowledge and understanding that during the years 1945 and 1946, or either of them, he had an income which was taxable, and which he was required by law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such years and which he knew it was his duty to state in his return for such years.

There are various schemes, subterfuges, and devices that may be resorted to, to evade or defeat the tax. The one alleged in this indictment is that of filing a false and fraudulent return with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the Government. The attempt must be wilful, that is, intentionally done with the intent that the Government should be defrauded of the income tax due from the de-

fendant. The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly or intentionally did not set up his income and thereby the Government was cheated or defrauded of taxes, that he intended to defeat the tax.

Guzik v. United States,
54 F. 2d 618 (CCA-7), certiorari denied,
285 U.S. 545; Section 145 (b), IRC.

Instruction No. 16

In determining the honesty of a defendant's intentions, you may weigh his own statements on the one hand as against his actions and conduct on the other hand.

United States v. Freeman,
167 F. 2d 786 (7th Cir., 1948).

Supplemental Instruction No. 16-A

There has been testimony in this trial which, if believed by you, would warrant you in finding that the defendant, Milton Olender, asserted at the trial a much more detailed recollection of transactions with George Goodman than he had admitted on earlier occasions. If you should find as a fact that such is the case, you are warranted in considering this fact in determining the truth or falsity of the defendant's account at the trial with respect to the Goodman transactions.

United States vs. Hornstein,
176 F. (2d) 219.

Instruction No. 26

Every person, except wage earners and farmers, liable to pay income tax is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income, and the deductions, credits, and other matters required to be shown in any income tax return.

Section 54 of the Internal Revenue Code, as implemented by Regulations 111, Section 29.54-1.

Instruction No. 29

You have heard expert testimony relating to the issues involved in this case. I charge you that the computations made by an expert are for the convenience of both sides in presenting the case for your consideration. You are not bound by the computations or other testimony of an expert witness, but you should give such testimony the weight to which you determine it is entitled in the light of the other proof in the case and also with reference to your conclusions as to whether or not the facts, on which the particular expert's testimony was based, have been established by the necessary degree of proof.

Instruction No. 30

The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the method of accounting regularly employed in keeping the books of the taxpayer; but

if no such method of accounting has been employed, or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as, in the opinion of the Commissioner, does fairly reflect the income.

The Government is authorized by law, when the books are found to be inadequate, to adopt a reasonable method of ascertaining income. And so in this case, it has undertaken to find out what the defendant was worth at the beginning of the year and what he was worth at the end of the year, so as to show what he had accumulated as income in the meantime.

If, at the end of the year, a man has in his possession more property than he had at the beginning of the year, it goes without saying that he got it from some place; and, unless he got it by gift or inheritance or loan, it would seem that he got it by earning it, and that it was part of his income.

Charge of the Court in *United States v. Flaccomio*, D.C., Md.

Instruction No. 31

The Government has placed before you evidence relating to the defendant's net worth at the end of the years 1945 and 1946. A defendant's net worth for a given year is the difference between all of his assets and all of his liabilities. Increase in net worth for any year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year. In order to compute the defendant's taxable net income by this method

you should add the defendant's living expenses for that year and the income taxes which he paid during that year to the increase in net worth. These expenditures should be added because they are not represented in the assets which the defendant has accumulated and are not deductible expenses. If you find that the defendant had an increase in net worth for the years 1945 and 1946 and also had a business or calling of a lucrative nature, there is most potent testimony that the defendant had income for those years, and, if the amount exceeds exemptions and deductions, then that income is taxable.

[Endorsed]: Filed October 16, 1952.

[Title of District Court and Cause.]

PLAINTIFF'S INSTRUCTIONS REFUSED AS
COVERED BY THE COURT OR OTHER-
WISE INAPPLICABLE

Dated October 10, 1952.

/s/ GEORGE B. HARRIS,
United States District Judge.

Instruction No. 1

(It is requested that the Court give its usual instructions upon the following subjects:)

1. Province of court and jury.
2. Effect of indictment.

3. Presumption of innocence, and burden of proof.
4. Duration of presumption of innocence.
5. Presumption that one intends natural consequence of acts.
6. Credibility of witnesses.
7. *Falsus in uno, falsus in omnibus.*
8. Oral admissions (if instruction requested by accused.)
9. Failure of accused to testify (if instruction requested by accused.)
10. Weighing testimony of accused, and interest of accused.
11. Effect of evidence of good character (if applicable to evidence).
12. Arguments of counsel.
13. Duty to construe instructions as a whole.
14. Circumstantial evidence.
15. Admissions against interest.
16. Penalties the province of the Court alone.
17. Minor discrepancies.

Instruction No. 2

“The proof in a criminal case need not exclude all doubt. If that were the rule, crime would be punished only by the criminal’s own conscience, and organized society would be without defense against the conscienceless criminal and against the weak, the cowardly and the lazy who would seek to live on their wits. The proof need go no further than reach that degree of probability where the

general experience of men suggests that it has passed the mark of reasonable doubt.”

Henderson v. United States,

143 F. (2d) 681, at p. 682;

United States v. Henry von Morpurgo,

(N.D. Cal., 33021); Murphy, J.

Instruction No. 3

To establish its case the Government must prove:

(1) That income tax was due and owing in addition to that declared by the defendant on his original income tax return; and

(2) That the defendant wilfully attempted to evade and defeat such tax.

In order to find the defendant guilty, you must be convinced beyond a reasonable doubt from all the evidence submitted, of the guilt of the defendant of the crime with which he is charged. You must be convinced both that a tax was due and owing in addition to that declared on his return and that the defendant wilfully attempted to evade and defeat such tax.

United States v. Schenck,

126 F. 2d 702 (CCA 2d, 1942);

United States v. Miro,

60 F. 2d 58 (CCA 2d, 1932);

Gleckman v. United States,

80 F. 2d 394 (CCA 8th, 1935); certiorari denied (1936), 297 U.S. 709, 56 S.Ct. 501;

O'Brien v. United States,

51 F. 2d 193 (CCA 7th, 1931).

Instruction No. 11

On the question of intent to evade, and just by way of illustration and not by way of limitation, there are certain matters which you could consider pointing to intent so far as tax evasion is concerned if you found they existed in this case. These are general illustrations: Keeping a double set of books, making false entries in the books, altering invoices, destruction of books, concealment of assets, covering up sources of income, handling one's affairs to avoid the making of usual records, and any conduct the likelihood of which would be to mislead or conceal. And if the tax evasion motive plays any part in such conduct, the offense may be made out even though the conduct I have mentioned might also serve some other purpose.

Lustig v. United States,
163 F. 2d 85 (CCA 2);

Spies v. United States,
317 U.S. 492.

Instruction No. 12

You may find the evidence of an intent to commit the crime of attempting to evade and defeat the payment of a tax, even though there is coupled with that intent the desire to suppress information as to acts which are criminal in other ways. Thus, even if you should find that the defendant desired to conceal his receipt of moneys from anyone, you may also find in addition to such motive the existence of an intent to defraud the United States of

moneys due as income taxes and to attempt to defeat or evade such taxes.

United States v. Wexler,
79 F. 2d 526 (CCA-2).

Instruction No. 15

The indictment in this case charges a violation of Section 145 (b) of Title 26, United States Code, which so far as it applies here reads:

“* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter * * * shall * * * be guilty”

of an offense.

Instruction No. 17

The jury is composed of twelve people. While undoubtedly their verdict should represent the opinions of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. Each juror should listen, with a disposition to be convinced, to the opinions and arguments of the others. It is not intended that a juror should go to the jury room with a fixed determination that the verdict shall represent his opinion of the case at that moment. Nor is it intended that he should close his ears to the arguments of other jurors who are equally honest and intelligent with himself.

From the charge of Mr. Justice Willis Van Devanter in

United States v. William J. Graham,
(CCA-2), 102 F. 2d 436, certiorari denied,
307 U.S. 643.

Instruction No. 17-A

The jury are the exclusive judges of the weight of each of the several items of evidence and are also the exclusive judges of the credibility of each of the witnesses. In passing upon the credibility of a witness and the weight to be given to his testimony, the jury may consider his appearance upon the witness stand, whether he testified with candor or otherwise, and his interest in the case.

From the charge of Mr. Justice Willis Van Devanter in

United States v. William J. Graham,
(CCA-2), 102 F. 2d 436, certiorari denied,
307 U.S. 643.

Instruction No. 18

While the accused at the beginning of the trial is presumed to be innocent, yet if the proof establishes his guilt beyond a reasonable doubt, then the presumption of innocence disappears.

Shepard v. United States,
236 Fed. 73.

Instruction No. 19

The Government is not required to prove guilt to a mathematical certainty, nor is the Government

required to establish the exact amount of unreported income.

Schuerman v. United States,
174 Fed. (2d) 399.

Instruction No. 20

The defendant is charged with wilfully attempting to evade income taxes for the years 1945 and 1946 by filing a false return. Certain evidence has been admitted relating to events which occurred in other years. This evidence has been admitted under the rule that acts similar to those charged in the indictment can be proved to show intent when they are sufficiently near and so related in kind as to throw light on the question of intent and are closely related and of the same general nature as the transactions out of which the alleged criminal act arose. Evidence of such facts and circumstances, both prior and subsequent, are admissible if not too remote in time.

Schmeller v. United States,
143 F. (2d) 544, 551.

Instruction No. 21

“If it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day and month by month, receiving moneys and depositing them to his account and checking against them for his own uses, there is most potent testimony that he has income, and if the amount exceeds exemptions and deductions, that the income is taxable. United States v. Miro, (CCA) 60 F. (2d) 58;

Oliver v. United States, (CCA) 54 F. (2d) 48, certiorari denied, 285 U.S. 543, 52 S. Ct. 393, 76 L. Ed. 935; Guzik v. United States, (CCA) 54 F. (2) 618, certiorari denied, 285 U.S. 545, 52 S. Ct. 395, 76 L. Ed. 937; Capone v. United States, (CCA 7) 51 F. (2d) 609, 619, 76 A.L.R. 1534; Orzechowski v. United States, (CCA 3) 37 F. (2d) 713. See, also, Chadick v. United States, (CCA 5) 77 F. (2d) 961; Paschen v. United States, (CCA) 70 F. (2d) 491.”

Instruction No. 22

Tinkoff v. United States,
86 F. (2d) 868.

“It is not necessary that the Government prove an evasion of all the tax charged. It is sufficient if any substantial portion of a tax was defeated and evaded. O’Brien v. United States, 51 F. (2d) 193, CCA-7, certiorari denied, 284 U.S. 673, 52 S. Ct. 129, 76 L. Ed. 569; Gleckman v. United States, 80 F. (2d) 394 (CCA-8), certiorari denied, Feb. 10, 1936, 297 U.S. 709, 56 S. Ct. 501, 80 L. Ed. 996; United States v. Miro, 60 F. (2d) 58 (CCA-2).”

Instruction No. 23

The law does not give a defendant any presumption of good character.

Michelson v. U. S.,
335 U.S. 469, 475 (1948).

Instruction No. 24

The question of possible punishment of the defendant in the event of conviction is no concern of

the jury, and should not in any sense enter into or influence your deliberations. The duty of imposing sentence rests exclusively upon the Court. The function of the jury is to weigh the evidence and determine the guilt or innocence of the defendant solely upon the basis of such evidence. Under your oaths as jurors, you cannot allow a consideration of the punishment which may be inflicted upon the defendant, if he is convicted, to influence your verdict in any way.

Instruction No. 25

The Government is required to prove its case beyond a reasonable doubt. But the requirement of proof beyond a reasonable doubt is a direction to the jury, not a rule of evidence; it operates on the whole case, and not on separate bits of evidence each of which need not be so proven; and it cannot be accorded a quantitative value other than as a general cautionary admonition.

Gariepy vs. United States,

189 F. (2d) 459, 462, (CCA-6);

United States vs. Valenti,

134 F. (2d) 362, 364, (CCA-2);

United States vs. Spagnuolo,

168 F. (2d) 768, 770, (CCA-2);

United States vs. Yeoman Henderson, Inc.,

193 F. (2d) 867; (CCA-7);

McCoy vs. United States,

169 F. (2d) 776, (CCA-9).

Instruction No. 26 (Revised)

Every person, except wage earners and farmers, liable to pay income tax is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income, and the deductions, credits and other matters required to be shown in any income tax return.

There has been some testimony in this trial tending to excuse the defendant's failure to record on his books wholesale sales of sailor suits on the ground that the entering of such transactions therein would have "distorted" the ratio between the cost price and purchase price of the goods he sold. I charge you as a matter of law that the defendant was required to keep a record of all his purchase and sales transactions. However, he could, of course, have segregated his records of wholesale and retail sales if he had cared to do so.

Section 54 of the Internal Revenue Code, as supplemented by Regulations 111, Section 29.54-1.

Instruction No. 27

The word "wilful" when used in a criminal statute generally means an act done with a bad purpose; without justifiable excuse; or stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether one has the right so to act.

United States vs. Murdock,
290 U. S. 389, 394-5.

Instruction No. 28

The law provides that if the method of accounting employed by a taxpayer does not clearly reflect his income, income shall be computed in accordance with such method as in the opinion of the Commissioner of Internal Revenue clearly reflects the taxpayer's income. Where a taxpayer's records are inadequate or inaccurate in substantial respects, the Courts have recognized (in both civil and criminal cases) that it is proper to determine taxable income by the net worth and expenditures method.

Of course, the Government does not have to prove the exact amounts of unreported income. To require a meticulous degree of proof in a case of the present sort would be tantamount to holding that skillful concealment is an invincible barrier to proof.

Section 41, Internal Revenue Code;

Barcott vs. United States,

169 F. (2d) 929, (9th Circuit);

United States vs. Johnson,

319 U. S. 503, 517-8.

Supplemental Instruction No. 32

The defendant has testified that he did not include the Goodman suits on the inventories as reported in his 1944 and 1945 Federal Income Tax returns. I will charge you at this time that his failure so to do is improper and unlawful. The individual taxpayer making a return of his income tax to the United States under the Federal law certifies under the penalties of perjury that the figures in-

cluded therein are true and correct. It was therefore unlawful for the defendant to omit the Goodman suits from the inventories as reported on his returns.

However, the defendant in this case is not charged with that offense, and you cannot find him guilty of the offense charged in this indictment because you conclude that he was guilty of another offense.

If you believe, however, that the defendant had no Goodman suits as of December 31, 1944, then you need pay no consideration to the instruction where I have given you, because we are then not concerned with whether or not the offense was committed.

But, if you should believe that the defendant did have Goodman suits on hand as of December 31, 1944, then you may consider the unlawful failure to include them in the defendant's 1944 and 1945 income tax returns in determining the matter of the intent of the defendant with respect to the offenses charged in the indictment in this case.

Based on an instruction given by the Honorable Louis E. Goodman in

United States vs. Port, No. 33162.

Supplemental Instruction No. 16B

The defendant has testified that he did not include the Goodman suits in the inventory of December 31, 1944, as reported on his 1944 Federal Income Tax Return. I will charge you at this time that if you find that his failure so to do was intentional or wilful, then it was improper and unlawful. Under

the Federal law, the individual taxpayer making a return of his income tax to the United States certifies under the penalties of perjury that he believes that the figures included therein are true and correct. It was therefore unlawful for the defendant to omit the Goodman suits from the inventory reported on his return if he did so knowingly.

However, the defendant in this case is not charged with filing a false inventory as of December 31, 1944; and you cannot find him guilty of any of the offenses charged in this indictment because you find he was guilty of another offense not charged in the indictment herein.

If you find that the defendant had no Goodman suits on hand as of December 31, 1944, then you need not consider this instruction. But, if you should believe that the defendant did have Goodman suits on hand as of December 31, 1944, then you may consider defendant's failure to include them in his December 31, 1944, inventory in determining the question as to whether the defendant intended to evade and defeat income taxes as charged in the indictment herein.

Based on an instruction given by the Honorable Louis E. Goodman in

United States vs. Port, No. 33162.

[Endorsed]: Filed October 16, 1952.

[Title of District Court and Cause.]

DEFENDANT'S INSTRUCTIONS GIVEN

Dated: October 10, 1952.

/s/ GEORGE B. HARRIS,

United States District Judge.

Defendant's Requested Instruction No. 2

Section 145(b) of the Internal Revenue Code makes any person guilty of crime "who wilfully attempts in any manner to evade or defeat" any income tax or the payment thereof.

To prove its case, the Government must establish first that this defendant received taxable income which he failed to report on his return and that therefore his tax liability was greater than that shown on the return; and secondly, that the failure to report the alleged additional income was pursuant to a wilful attempt to evade or defeat his income taxes and those of his wife. It is necessary that the Government establish both elements of its case beyond a reasonable doubt.

Authorities:

Rose vs. United States,

(CCA-10; 1942) 120 F. (2d) 622, 626;

United States vs. Schenck,

(CCA-2; 1942) 126 F. (2d) 702, 704-705;

Gleckman vs. United States,

(CCA-8; 1935) 80 F. (2d) 394, 399.

Therefore if you have a reasonable doubt that the defendant omitted any income from his return, the

defendant is not guilty of the offense charged. And even if you find that the defendant omitted a portion of his income from his return and that of his wife, the defendant is not guilty unless you are convinced beyond a reasonable doubt that in failing to report such income, the defendant wilfully attempted to defeat or evade his income taxes and those of his wife.

The mere failure of a taxpayer to report a portion of his taxable income is not a crime within the meaning of Section 145(b) unless it has been proved beyond a reasonable doubt that he wilfully attempted to defeat or evade his income taxes or those of his wife.

Authority:

United States vs. Koppelman,
(D. C. M. C. Pa.; 1945) 61 F. Supp. 1007,
1008.

Defendant's Requested Instruction No. 3

The Government has presented figures allegedly representing the defendant's unreported income for the years in question based upon its computation of the defendant's net worth at the end of the years 1944, 1945 and 1946 respectively. You are instructed to disregard these figures and computations unless you have found, or are convinced beyond a reasonable doubt, that the defendant engaged in profitable transactions or activities (as distinct from mere "wash" or "no profit" transactions or activities) which he failed to record on his books. If you find that the only transactions omitted from the books

are such as resulted in no profit, there has been no proof of unreported income and you should acquit this defendant.

Authorities: In all decided cases where conviction was sustained on the net worth and expenditures method, the Government proved by independent affirmative evidence the receipt of unreported income (and not mere proceeds from wash transactions) from a specific transaction or a specific source of income not covered in the return.

United States vs. Chapman,

(CCA-7; 1948) 168 F. (2d) 997, 1001, 36 AFTR 1176

(Defendant was proved to have received black market overpayments in addition to regulation prices billed for meat on invoices.)

Scheuerman vs. United States,

(CCA, 1948) 174 F. (2d) 397.

(Defendant derived income from an illegal "numbers" game and kept no books at all.)

United States vs. Skidmore,

(CCA-7, 1941) 123 F. (2d) 604, 315 U. S. 800;

(Defendant sold "protection" to illegal operators of "handbooks" and no part of the receipts was ever included in his returns.)

United States vs. Johnson,

(1943) 319 U. S. 503, 320 U. S. 808;

(Defendant operated gambling establishments and did not report their winnings.)

United States vs. Potson,
(CCA-7, 1948) 171 F. (2d) 495.

(Defendant realized substantial income from gambling activities which he failed to report; also defendant manipulated the registers at his restaurant business so as to remove and conceal a portion of the receipts.)

Gleckman vs. United States,
(CCA-8; 1935).

(Defendant was proved to have conducted an illegal liquor business in addition to the business shown on the return as to which no books were kept and unreported income was traceable to the illegal liquor business.)

Defendant's Requested Instruction No. 5

The net worth approach of proving unreported income is an attempt to prove unreported income by circumstantial evidence where the Government has no direct evidence of unreported income. Circumstantial evidence may be a basis for conviction only if the evidence excludes every reasonable possibility of innocence.

Proof of the circumstance that the defendant's acquisition of assets plus his non-deductible expenditures during a given year exceeded his reported income, is not inconsistent with the theory that such excess expenditures may have been made from sources other than current income, e.g., from cash and other assets accumulated prior to the starting point.

Therefore unless the evidence has negated beyond a reasonable doubt, the possibility that the excess expenditures may have been made from prior accumulations, the Government has failed to prove that such expenditures constituted unreported taxable income.

Authorities:

- Stubbs vs. United States,
(CCA-4, 1924), 2 F. (2d) 468;
Lamb vs. United States,
(CCA-1, 1920) 264 F. 660, 664;
Bryan vs. United States,
(CCA-5, 1949) 175 F. (2d) 223, 225;
Fenwick vs. United States,
(CCA-5, 1949) 177 F. (2d) 788.

Defendant's Requested Instruction No. 6

Wilfulness is an essential element of the offense charged in each of the counts of the indictment. Wilfulness means a specific wrongful intent to evade the tax. Therefore, unless you find beyond a reasonable doubt, not only that a false return has been filed but that the defendant filed, or caused the return to be filed, with knowledge that it was false and with the corrupt and criminal intent to evade his obligation, you must acquit the defendant.

Authorities:

- Hargrove vs. United States,
(CCA-5, 1933) 67 F. (2d) 820, 822, 823;
Haigler vs. United States,
(CCA-10, 1947), 172 F. (2d) 386.

Defendant's Requested Instruction No. 7

To find the defendant guilty of a wilful attempt to evade the tax, you must be convinced beyond a reasonable doubt: (1) That the defendant intended to evade or defeat the tax; and (2) that he did some affirmative act in furtherance of such intent.

Authorities:

Guzik vs. United States,
(CCA-7,) 54 F. (2d) 618,
Cert. den. 285 U. S. 545;
Spies vs. United States,
(1943) 317 U. S. 492.

It is not enough for the Government to prove that the defendant did some act which tended to understate his tax liability such as a failure to record a certain transaction or reporting a loss from a sale which, in fact, resulted in a taxable gain. In addition, the Government must prove beyond a reasonable doubt that the act was wilfully done, that is, with the criminal intent to defraud the Government of a tax which the defendant knew was due from him. If you find that the defendant omitted certain transactions from the books because he honestly believed that such transactions resulted in no profit, or that the defendant honestly though erroneously treated the result of a sale as a loss instead of a gain, then such transactions are not a basis for convicting the defendant of the crime with which he is charged.

Authorities:

Guzik vs. United States, *supra*;
Murdock vs. United States,
290 U. S. 389, 395-396.

Defendant's Requested Instruction No. 7-A

The Government charges that the defendant in preparing the return for the partnership which sold the Riverdale Ranch reported the transaction as resulting in a loss for the partnership when under the applicable law the sale resulted in a capital gain. Under the applicable law, the "cost basis" of the property (which measures the tax-free portion of the proceeds from the sale), was the appraised value of the property at the time of the death of the defendant's father, whereas the defendant claims to have used the original cost of the property as the "cost basis" in computing the reported loss of \$84.22.

If you find that the defendant reported a loss from the sale of the ranch because he did not know or misunderstood or misinterpreted the law applicable in such a case and not because he intended to evade his tax liability, the defendant is not guilty of any offense by reason of reporting a loss though, in fact, the transaction resulted in a capital gain.

In determining whether or not defendant was motivated by an intent to evade his tax liability, you may consider that the share of taxable income from the transaction attributable to defendant did not exceed \$497.64.

Authority:

Haigler vs. United States,
(CCA-10; 1949) 172 F. (2d) 986.

Defendant's Requested Instruction No. 9

The Government charges that the defendant omitted from the Milton H. Olender Net Worth Statement

(United States Exhibit 1), prepared for the Revenue Agents by Mr. Ringo, his attorney and accountant, certain stock of the Asturias Export-Import Corporation, as well as his wife's savings account. According to the files taken from the Bureau of Internal Revenue at San Francisco (Defendant's Exhibit 1), the Bureau determined that as of December 31, 1947 (the date as of which the Net Worth Statement was prepared), the stock was totally worthless.

If you find that the defendant honestly believed that neither the worthless stock nor his wife's savings account belonged on his Net Worth Statement, the defendant is not guilty of any wilful concealment and you may not infer from these omissions that the defendant harbored an intent to evade his taxes.

The Government has also adduced evidence that the taxpayer consummated several transactions involving the use of large amounts of cash. You are instructed that there is nothing unlawful about the use of large amounts of currency. If you find that the defendant did not attempt to use these transactions in any manner to conceal assets, then you may not infer any intent on the part of the defendant to evade his taxes.

Authority:

Seaman vs. United States,

(CCA-5, 1938) 96 F. (2d) 732;

Murdock vs. United States, 290 U. S. 389,
395, 396.

Plaintiff's Requested Supplemental Instruction

The defendant has testified that he did not include the Goodman suits in the inventory of December 31, 1944, as reported on his 1944 Federal Income Tax Return. I will charge you at this time that if you find that his failure so to do was intentional or wilful, then it was improper and unlawful. Under the Federal law, the individual taxpayer making a return of his income tax to the United States certifies under the penalties of perjury that he believes that the figures included therein are true and correct. It was therefore unlawful for the defendant to omit the Goodman suits from the inventory reported on his return if he did so with criminal intent to evade his tax liability.

However, the defendant in this case is not charged specifically with filing a false inventory as of December 31, 1944; and you cannot find him guilty of any of the offenses charged in this indictment because you find he was guilty of another offense not charged in the indictment herein.

If you find that the defendant had no Goodman suits on hand as of December 31, 1944, then you need not consider this instruction. But if you should believe that the defendant did have Goodman suits on hand as of December 31, 1944, then you may consider defendant's failure to include them in his December 31, 1944, inventory in determining the question as to whether the defendant intended to evade and defeat income taxes as charged in the indictment herein.

Based on an instruction given by the Honorable Louis E. Goodman in United States vs. Port, No. 33162.

Defendant's Requested Supplemental Instruction

Evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

Authority:

Section 2061 Code of Civil Procedure.

[Endorsed]: Filed October 16, 1952.

[Title of District Court and Cause.]

DEFENDANT'S INSTRUCTIONS REFUSED
AS COVERED BY THE COURT OR OTHERWISE
INAPPLICABLE

Dated: October 10, 1952.

/s/ GEORGE B. HARRIS,
United States District Judge.

Defendant's Requested Instruction No. 1

It is requested that the Court give its usual instructions upon the following subjects:

1. Province of Court and jury.
2. Effect of indictment.
3. Presumption of innocence and burden of proof.
4. Duration of presumption of innocence.
5. Definition of reasonable doubt.
6. Credibility of witnesses.
7. Oral admissions.
8. Effect of evidence of good character.
9. Circumstantial evidence.

Defendant's Requested Instruction No. 4

In this case, the Government has not offered any direct testimony of unreported income or of any undisclosed source of income. The defendant caused to be kept what appears to be a complete set of books in regard to the transactions of his business known as the Army and Navy Store and the Government has not offered any evidence showing any specific inaccuracies or omissions in the books of the defendant resulting in understatements of income.

In order to prove that the defendant received taxable income over and above that reported in the returns of the defendant and his wife for the years involved, the Government has attempted to reconstruct the defendant's taxable income for each of the two years by the net worth method, so-called. The Government has attempted to show the defendant's "net worth" (i.e., excess of assets over liabilities) at the starting point of the period (which, in this case, is December 31, 1944, or January 1, 1945).

It then attempted to show an alleged net worth increase for the first of the two years by comparing the starting net worth with the net worth at the end of the first taxable year involved; the Government then attempted to show an alleged net worth increase for the second year by comparing the net worth at the end of the first taxable year with the defendant's net worth at the end of the second taxable year involved. The Government contends that the alleged increase of the defendant's net worth during each of the two taxable years, plus a specified amount of non-deductible expenditures (representing taxes paid and living expenses) incurred during such year, constitutes the defendant's total taxable income. This indirect method of reconstructing a taxpayer's income is invalid unless the Government has clearly and accurately established all of the assets and liabilities of the taxpayer at the starting point of the period. In this connection you must bear in mind that the list of assets and liabilities set forth in the stipulation admittedly does not include all of the assets and liabilities of the defendant at the beginning of the period.

If you then have a reasonable doubt that the assets which the Government contends the defendant owned at the starting point of the period (December 31, 1944) included all of the assets owned by the defendant at that time, the alleged net worth increase and unreported income have not been proved and the Government's case has failed. In that case you must acquit the defendant.

Authorities:

United States v. Chapman

(CCA-7, 1948) 168 F. (2d) 997;

Bryan v. United States

(CCA-5, 1949) 175 F. (2d) 223, 224;

United States v. Fenwick

(CCA-7, 1949) 177 F. (2d) 488.

Defendant's Requested Instruction No. 4-A

If you believe that the so-called Goodman transaction took place as set forth on defendant's Exhibit No. AL (Schedule 1), and if you further believe that the United States Treasury Bonds shown as Mother's Bonds on defendant's Exhibit AK (Schedule 3) were held in the box of the defendant and his mother for his mother and were, in fact, owned by the defendant's mother, then the Government's net worth computation and the Government's computation of net income allegedly received by the defendant as set forth on U. S. Exhibit 51 are contrary to fact and invalid. In that event, you should acquit the defendant.

Authorities:

Rose v. United States

(CCA-10; 1942) 120 F. (2d) 622, 626; 29 AFTR 686, 690;

United States v. Schenck

(CCA-2; 1942) 126 F. (2d) 702, 704, 705, 28 AFTR 1502, 1504-1505;

Gleckman v. United States

(CCA-8, 1935) 80 F. (2d) 394, 399, 16 AFTR 1425, 1430.

Defendant's Requested Instruction No. 4-B

If you have a reasonable doubt that the Government's computation of the defendant's base period net worth (that is, the net worth as at December 31, 1944, set forth on United States Exhibit No. 51), is correct or that the list of assets shown on United States Exhibit No. 51 is complete, then this defendant is entitled to an acquittal.

Authorities:

Rose v. United States

(CCA-10; 1942) 120 F. (2d) 622, 626, 29
AFTR 686, 690;

United States v. Schenk

(CCA-2; 1942) 126 F. (2d) 702, 704-705,
28 AFTR 1502, 1504-1505;

Gleckman v. United States

(CCA-8; 1935) 80 F. (2d) 394, 399, 16
AFTR 1425, 1430.

Defendant's Requested Instruction No. 5-A

(Alternative to Instruction No. 5)

The net worth approach of proving unreported income is an attempt to prove unreported income by circumstantial evidence where the Government has no direct evidence of unreported income. The Government has attempted to establish the defendant's taxable income by circumstantial evidence. Circumstantial evidence must not only be consistent with the theory of guilt but also must be utterly inconsistent with any other rational theory.

Proof of the circumstance that the defendant's acquisition of assets plus his non-deductible ex-

penditures during a given year exceeded his reported income, is not inconsistent with the theory that such excess expenditures may have been made from sources other than current income, e.g., from cash and other assets accumulated prior to the starting point.

Therefore, unless the evidence has negatived beyond a reasonable doubt, the possibility that the excess expenditures may have been made from prior accumulations, the Government has failed to prove that such expenditures constituted unreported taxable income.

Authorities:

Stubbs v. United States

(CCA-4, 1924), 2 F. (2d) 468;

Lamb v. United States

(CCA-1, 1920) 264 F. 660, 664;

Bryan v. United States

(CCA-5, 1949) 175 F. (2d) 223, 225;

Fenwick v. United States

(CCA-5, 1949) 177 F. (2d) 788.

Defendant's Requested Instruction No. 8

If you find that because of circumstances prevailing during the years in question, the defendant had no opportunity to know what his true income was, but did the best he could to keep reasonably accurate records, even though he did not comply with the best accounting practices, the defendant is not guilty of the offense with which he is charged.

In this connection you are also instructed that there is a distinction between what the law requires

and what public accountants consider good accounting practice. The income tax law does not require a taxpayer to keep records of wash transactions or transactions which result in no profit.

Authorities:

Hargrove v. United States

(CCA-5, 1933) 67 F. (2d) 820, 822-823;

Haigler v. United States

(CCA-10; 1947) 172 F. (2d) 386;

Internal Revenue Code, Sec. 41;

Huntington Securities Corp. v. Busey

(CCA-6; 1940) 112 F. (2d) 368, 370.

Defendant's Requested Instruction No. 8-A

In considering the question of wilfullness, you should take into account whether or not the defendant, in good faith, made available to his bookkeeper all of the invoices, papers, checks and other data she required for properly keeping the books. If the defendant on occasions failed to give the bookkeeper certain essential information or data, no inference of wilfullness may be drawn from such failure if it was not motivated by a desire to evade his tax liability but was due to such factors as oversight, overwork or a belief, in good faith, that the transaction was a non-profit sale resulting in no taxable income.

Authority:

Haigler v. United States

(CCA-10; 1947) 172 F. (2d) 986.

[Endorsed]: Filed October 16, 1952.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find as to Milton H. Olender, the defendant at the bar, as follows:

- Guilty, as to Count 1;
- Guilty, as to Count 2;
- Guilty, as to Count 3;
- Guilty, as to Count 4.

/s/ EDWARD C. CHEW,
Foreman.

[Endorsed]: Filed October 10, 1952.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Defendant, by his attorneys, John V. Lewis and Emmet F. Hagerty, moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.
2. The verdict as to the third and fourth counts of the indictment relating to the year 1946 is contrary to law and to the weight of the evidence.
3. The verdict as to the first and second counts relating to the year 1945 is not supported by substantial evidence.
4. The Court erred in overruling defendant's

objections to the admission in evidence of United States Exhibits 26 and 45 and of the testimony of Charles R. Ringo, Attorney at Law.

5. The Court erred in overruling defendant's objections to the admission in evidence of United States Exhibit No. 55, which included the affidavit filed by the defendant's wife on May 6, 1939.

6. The Court erred in giving the instructions excepted to by defendant's counsel.

7. The Court erred in refusing to strike the testimony of the witness Root from line 17, p. 1257, to line 5, p. 1258, where the witness Root read from the purported Goodman invoices, which were not admissible in evidence.

8. Defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances:

The attorney for the Government stated in his argument to the jury that the defendant and the witnesses Leavy and Lerman, were engaged in black market transactions, whereas there was no evidence in the record to the effect that the defendant ever engaged in any black market transactions.

Dated: October 14, 1952.

SHERWOOD & LEWIS,
EMMET F. HAGERTY,

By /s/ JOHN V. LEWIS,
Attorneys for Defendant.

[Endorsed]: Filed October 13, 1952.

United States District Court for the Northern
District of California, Southern Division

No. 33181

UNITED STATES OF AMERICA,

vs.

MILTON H. OLENDER.

JUDGMENT AND COMMITMENT

On this 10th day of November, 1952, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Verdict of Guilty of the offense of violations of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b). (On or about the following dates, in the Northern District of California, Milton H. Olender, late of Oakland, California, did wilfully and knowingly attempt to defeat and evade a large part of the income taxes due and owing by defendant Milton H. Olender and his wife, Bessie B. Olender, to the United States of America for the following calendar years, by filing with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, California, certain false and fraudulent income tax returns, viz:

Count 1—March 15, 1946, filed false Income Tax Return of Milton H. Olender for year 1945;

Count 2—March 15, 1946, filed false Income Tax Return of Bessie B. Olender for year 1945;

Count 3—March 15, 1947, filed false Income Tax Return of Milton H. Olender for year 1946;

Count 4—March 15, 1947, filed false Income Tax Return of Bessie B. Olender for year 1946,

as charged in said Counts 1, 2, 3, 4 of indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

Three (3) years and fined Ten Thousand Dollars (\$10,000.00) on Count One.

Three (3) years and fined Ten Thousand Dollars (\$10,000.00) on Count Two.

Three (3) years and fined Ten Thousand Dollars (\$10,000.00) on Count Three.

Ordered that said sentence of imprisonment and fine as to Counts One, Two, and Three commence and run Concurrently.

Ordered that the defendant pay a fine of Ten Thousand Dollars (\$10,000.00) on Count Four.

Total Sentence—Three (3) years and Twenty Thousand Dollars (\$20,000.00) fine.

It Is Adjudged that the defendant pay costs of prosecution herein.

Ordered that defendant may have a stay of execution for fifteen (15) days as to payment of fines.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ GEORGE B. HARRIS,
United States District Judge.

Examined by:

/s/ ROBERT J. DREWES,
Assistant U. S. Attorney.

The Court recommends commitment to an institution to be designated by the U. S. Attorney General.

C. W. CALBREATH,
Clerk.

By /s/ HOWARD F. MAGEE,
Deputy Clerk.

[Endorsed]: Filed and entered November 10, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Milton H. Olander, 121 Alpine Terrace, Oakland, California.

Name and Address of Appellant's Attorneys: Emmet F. Hagerty, Esq., 240 Stockton Street, San Francisco, Calif.

Messrs. Sherwood & Lewis, 703 Market Street, San Francisco, Calif.

Offense: Wilful attempt to defeat or evade income tax.

Found guilty on four counts of the indictment, charging in each instance, violations of Section 145(b) Internal Revenue Code, 26 U.S.C. Section 145(b).

Sentenced: November 10th, 1952.

Defendant is now on bail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Pursuant to Rule 38(a)(2), Federal Rules of Criminal Procedure, we hereby service notice that we do not elect to enter upon the service of the sentence pending appeal.

Dated: November 10th, 1952.

/s/ EMMET F. HAGERTY,

SHERWOOD & LEWIS,

By /s/ JOHN V. LEWIS,

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed November 10, 1952.

[Title of District Court and Cause.]

PETITION FOR STAY OF PAYMENT OF
FINE PENDING DETERMINATION OF
APPEAL

Now Comes Milton Olender, the defendant in the above-entitled cause and the petitioner herein, in person and by John V. Lewis, Esq., and Emmet F. Hagerty, Esq., his attorneys, and respectfully represents:

1. That he was indicted for violation of Section 145(b) Internal Revenue Code, 26 U.S.C. section 145(b) on four counts, and was tried before the Honorable George B. Harris, District Judge, and a jury; that he was found guilty on all four counts, and that judgment upon the verdict was entered on November 10, 1952, whereby defendant and petitioner herein was sentenced to serve three years, and that he pay a fine of Twenty Thousand Dollars (\$20,000.00); and that the Court ordered a stay of execution of said judgment for a period of fifteen (15) days from November 10, 1952.

2. That on November 10, 1952, defendant and petitioner herein caused a notice of appeal to be duly filed as provided by law in preparation for an appeal from said judgment to be filed with the United States Court of Appeals for the Ninth Circuit.

3. That the Court ordered petitioner to remain free on bail pending the determination of his appeal and that said bail was set at Two Thousand Five Hundred Dollars (\$2,500.00).

4. That the petitioner herein is carrying on a

retail business known as the Army and Navy Store, at 1026 Broadway, Oakland, California; that the said business is the principal source of livelihood for defendant and his family. That the payment of the fine of Twenty Thousand Dollars (\$20,000.00) at this time would result in depriving petitioner's business of the necessary cash resources and would make it impossible for petitioner to continue the operation of said business while said appeal is pending.

5. That the Government of the United States now has liens on property of said petitioner of the value in excess of Three Hundred Thousand Dollars (\$300,000.00).

Wherefore, your petitioner respectfully represents that the ends of justice and the best interests of the public as well as those of your petitioner, will be subserved by ordering a stay of the payment of said fine pending the determination of petitioner's appeal; and

Your petitioner does respectfully pray the Court for a stay of the payment of such fine upon such terms and conditions as the Court may deem best.

/s/ MILTON H. OLENDER,
Petitioner.

SHERWOOD & LEWIS,
EMMET F. HAGERTY,

By /s/ JOHN V. LEWIS,
Attorneys for Petitioner.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed November 21, 1952.

[Title of District Court and Cause.]

ORDER GRANTING STAY OF PAYMENT OF
FINE PENDING DETERMINATION OF
APPEAL

Upon Reading and filing the petition of Milton H. Olender, the defendant in the above-entitled matter; and

Good Cause Appearing Therefore,

It Is Hereby Ordered that the said defendant be, and he is hereby granted, a stay of execution until the 21st day of December, 1952; and

It Is Hereby Further Ordered that said defendant be, and he is hereby granted a stay of the payment of the fine of Twenty Thousand Dollars (\$20,000.00) imposed pursuant to judgment entered on November 10, 1952, provided that said defendant shall post a bond in the amount of \$20,000.00.

Dated this 21st day of November, 1952.

/s/ GEORGE B. HARRIS,

Judge of the United States
District Court.

[Endorsed]: Filed November 24, 1952.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 33181

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MILTON H. OLENDER,
Defendant.

Before: Hon. George B. Harris,
Judge.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

ROBERT J. DREWES, ESQ.,
JAMES H. SHELTON, ESQ.

For the Defendant:

JOHN V. LEWIS, ESQ.,
EMMET HAGERTY, ESQ.

September 15, 1952, 3:00 P.M.

The Court: Stipulated that the jurors are present, Gentlemen?

(So stipulated.)

The Court: That stipulation may endure throughout the progress of the trial unless otherwise indicated?

(So stipulated.)

The Court: You may proceed.

Mr. Hagerty: If your Honor please, may we have on behalf of the defendant an order excluding all witnesses until called to testify?

Mr. Drewes: No objection, your Honor. May that exclude the revenue agents and special investigators?

The Court: So ordered.

Mr. Drewes: May it please the Court and ladies and gentlemen of the jury. At this time, as the prosecuting attorney in the case, it is my duty to explain to you the Government's case in the matter. The purpose of doing that, of course, is to enable you to more fully appreciate the sometimes unrelated bits of evidence as the Government puts that evidence and that testimony into the record. That is particularly necessary in a case of this type for reasons that I will explain to you in just a moment.

As the Judge has already told you, the defendant in [2*] this case has been charged with the willful attempt to evade income taxes on the part of himself and on the part of his wife for the years 1945 and 1946. There are four counts in the indictment, two for each year.

The reason for that is that the taxpayer reported his income and that of his wife on a community basis so that the taxpayer and his wife each submitted a return for the two years in question. Now, in this particular case, the taxpayer, Mr. Olender, has been charged with an attempt to evade

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

his own taxes in connection with the returns which he submitted on his behalf, and also with the willful attempt to evade that portion of the community income which his wife returned on her income tax returns for the two years.

Of course, Mr. Olender has been charged in connection with the returns submitted by his wife rather than Mrs. Olender herself because we expect to prove that he prepared the returns, and of course submitted them in her name as is the common practice in this and other states which follow the community property system.

As I believe the Court will instruct you at the proper time, each one of the four counts stands alone and may be considered by you alone, and of course that is also true, I am sure the Court will tell you, with respect to the two years involved. Mr. Olender has been charged with [3] filing false returns, as I have explained to you, both for the year 1945 and for the year 1946, and so the Government's proof will be considered by you with respect to each of those two years.

Now, in a prosecution of this kind the Government must prove first that the taxpayer enjoyed unreported income. That is, that he had income in excess of the amounts which he returned for the years in question, in this particular case, of course, for the years 1945 and 1946. Then secondly, the Government must prove that the taxpayer intended to evade taxes to the United States when he failed to return this unreported amount of income.

In this particular case the Government will at-

tempt to prove—and I submit will prove to your satisfaction—that Mr. Olender failed to report substantial income in 1945 and 1946, and we are going to prove that by resorting to what is referred to in cases of this kind as the net worth basis, or the net worth approach to the establishment of unreported income, and that is why I mentioned to you a moment ago that the opening statement on behalf of the prosecutor is particularly important in cases of this particular kind, because I want to explain to you, and I think I can in very simple language, what we mean by the net worth approach.

Possibly some of you already have had some experience [4] in such matters or can anticipate the approach which I am going to explain to you now. It is this. The Government starts out by proving in a selected base year the value of the assets and the extent of the liabilities owned and outstanding against the taxpayer as of the last day of that year or the first day, as the case may be. Then, the Government establishes the extent of the assets and the extent of the liabilities of the taxpayer as of the last day of the next succeeding year. If there is a material difference between the two the conclusion is inescapable that the taxpayer has either increased his holdings or decreased his holdings during the period in question.

So hypothetically, suppose that on the 31st day of December of 1930 a man has total net assets, that is the gross assets subtracting his obligations from them of \$50,000. Suppose on the same day, December 31st of 1931 his assets minus his liabili-

ties or his net assets is \$100,000. It follows then, of course, that he has increased his holdings by the amount of \$50,000 during the course of that year measured between the dates December 31, 1930, and the same day of 1931.

Now, that isn't the entire story, of course, because the Government then, in measuring the income of the taxpayer for that particular year may of course, add to that \$50,000 by which figure it has shown his holdings increased [5] during the period, the Government may add to that figure such items as federal taxes paid.

So if we have shown by a net worth basis that he increased his holdings by \$50,000 he must have had income in that amount in order to acquire those assets. If we also show that during that year he paid \$5,000 in federal income taxes we can add that to the \$50,000 and say, well, it is obvious that he had \$55,000 in income for that year.

There is yet another class of expenditures which we may take into consideration and those are such non-deductible items as living expenses. You know, of course, that taxpayers—which is almost a universal class these days, may not deduct from their reported incomes such items, as food, rent, domestic help, telephone, utilities, and matters of that kind. Of course, I am not talking now of a business taxpayer or corporate taxpayer, but the individual taxpayer. He may not take deductions for items of that kind. So if we can then establish during this hypothetical year in question that in addition to the increase in his assets, in his net assets, he

also paid \$5,000 income taxes and then that he also expended, let's say \$5,000 in living expenses, non-deductible expenses, we may then safely add that to the figure and say, now we have established that during this particular year this particular taxpayer must [6] have had income of \$60,000. Now, that is the net worth, so-called net worth approach to the proof of taxpayer income during a specific period.

In this particular case the Government will attempt to establish its base year as 1944, which is the year immediately preceding the two years for which it is charged that the defendant attempted to evade his taxes. In some cases the base year is often much more remote in time. Sometimes the Government, in cases of this kind, goes back a number of years for the purpose of establishing its starting point. But our starting point here is the year 1945 and we will prove that during the years 1945 and 1946 this taxpayer enjoyed income substantially in excess of the sums which he and his wife reported for those two years.

There is another matter that I wish to take up just preliminarily with you. The prosecution and counsel for the defendant have succeeded in working out a stipulation, which is something in agreement covering many of the assets owned by the defendant during this period of time. That will materially shorten the trial and is advantageous in that respect to all concerned. At the proper time I will introduce it into evidence and at that time I will either read it in its entirety or sum-

marize it for you. The stipulation does not purport to cover all of the assets owned by the defendant, nor does it cover all of the so-called [7] non-deductible living expenses that I mentioned.

Of course, there is a very simple reason for that. It is because some items are in dispute. The stipulation covers many items such as the amount of money in banks and Treasury bonds that are held by the taxpayer, and the value of his business in part and things of that kind which are a matter of record and of which there is no dispute. So we have set those matters forth in detail in the stipulation which will be introduced into the record in this case and which you will be instructed, in due course, constitutes evidence in the case and is to be accepted by you as such.

But to repeat, that stipulation does not include all of the assets. The Government will introduce evidence of additional assets owned by the taxpayer during the course of the trial.

With respect to the intent of the defendant, the Government will prove that the defendant, whom I should state to you at this time is a businessman, a merchant, and the owner and operator of what is known as the Army-Navy Store located on Broadway in the City of Oakland. He acquired that store in 1928 and has operated it continuously at the same location, I believe, since that date.

Now, the Government will establish that the defendant is a man who, as I have already indicated, not only has had [8] extensive business experience, but is also a college graduate, attended the Uni-

versity of California where, among other courses, he also studied accounting.

In the operation of his business we will show that he was intimately aware of the status of his business, that he was familiar with accounting procedures, and that as far as the accounting and fiscal operations of his business was concerned he himself undertook to control them, and knew at all times precisely what the status of his business was.

We will show that the understatements of income for the two years in question were so large that the defendant must have known that they existed; that they were of such magnitude that any such inferences as might, in some other cases be drawn as to inadvertence or mere negligence is out of the question.

At the appropriate stage of the trial the Government will summarize for you the evidence of net worth which we believe will have been established. The evidence which you will hear, as I indicated to you a little while ago, is apt in a case of this kind to be just a little bit disjointed. It is rather hard to keep in one's mind a series of figures, to say nothing of an attempt to keep in one's mind a running calculation of just what all of the figures that one has heard mean at any given time. So, at the conclusion of the Government's case the [9] Government will summarize for you its version of what the evidence establishes with respect to the net worth and tax liability of the defendant for

the years in question. I can say that with absolute confidence, that if there is anything in that summary or recapitulation that the defense quarrels with that will be brought to your attention by the defendant's counsel forthwith and in as forceful a manner as possible.

That, ladies and gentlemen, is a brief summary of the type of case known as the net worth type case of which this is one, and a brief summary of what the Government intends to prove.

At the conclusion of Government's case I believe you will be satisfied that the defendant, Milton Olender, enjoyed large amounts of income for the two years in question which he did not report on his return, and you will conclude further that he knew that and intended to so do.

The Court: Call your first witness for the Government. Do you wish to reserve your statement, Counsel?

Mr. Lewis: Yes, sir.

The Court: I assumed you did.

LOUIS H. MOOSER, JR.

called as a witness for the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury. [10]

The Witness: Louis H. Mooser, Jr., 6815 California Street, San Francisco, California, Deputy Collector of Internal Revenue.

(Testimony of Louis H. Mooser, Jr.)

Direct Examination

By Mr. Drewes:

Q. Mr. Mooser, you are a deputy collector of internal revenue? A. Yes, sir.

Q. Assigned to what office?

A. The San Francisco office of the collector.

Q. What is the address?

A. 100 McAllister Street.

Q. As such do you have access to the official files and records of that collector's office?

A. Yes, I do.

Q. Mr. Mooser, have you brought with you this afternoon the tax returns of Milton Olender and Mrs. Olender for the years 1945 and 1946?

A. Yes, sir, I have.

Q. And did you get those from the files and records of the collector's office in San Francisco?

A. Yes, I did.

Q. May I see them?

(Thereupon the witness handed documents above referred to to Mr. Drewes.)

Mr. Drewes: At this time the Government will offer these [11] returns in evidence, your Honor. I understand Mr. Lewis has no objection.

The Court: They may be marked in evidence.

Mr. Drewes: May we have them marked separately, starting with 1945, Mr. Olender's return?

The Clerk: United States Exhibits 1, 2, 3 and 4 in evidence.

(Testimony of Louis H. Mooser, Jr.)

(Thereupon the documents above referred to were received in evidence and marked Government's Exhibits 1, 2, 3 and 4 respectively.)

Q. (By Mr. Drewes): Mr. Mooser, have you with you Mr. Olender's return for the year 1942?

A. Yes, sir, I have.

Q. Do you have with you a return for the Army-Navy Store, Broadway, Oakland, for the year 1942?

A. No, sir, I do not.

Q. Do you have with you a return of Milton Olender for the year 1943? A. Yes, sir.

Q. Do you have with you the return of Mrs. Olender for that year? A. Yes, sir.

Q. Do you have with you the return of Mr. Olender for the year 1944? A. Yes, sir. [12]

Q. Do you have with you the return of Mrs. Olender for the year 1944? A. Yes, sir.

Q. May I see those, please?

(Witness hands documents above referred to to Mr. Drewes.)

Mr. Drewes: At this time the Government will offer these returns as Government's Exhibits next in order. I understand there is no objection.

The Court: They may be marked appropriately.

The Clerk: United States Exhibits 5, 6, 7, 8, 9 and 10 in evidence.

(Thereupon the documents above referred to were received in evidence and marked United States Exhibits 5, 6, 7, 8, 9 and 10 respectively.)

(Testimony of Louis H. Mooser, Jr.)

Q. (By Mr. Drewes): Mr. Mooser, do you have with you the return of Milton Olender for the year 1947? A. Yes, sir.

Q. Do you have with you the return of Milton Olender for the year 1948? A. Yes, sir.

Q. May I have those, please?

(Thereupon the witness handed the documents above referred to to Mr. Drewes.)

Mr. Drewes: May I ask, your Honor, that these two returns be marked for identification. [13]

The Court: They may be marked for identification.

The Clerk: United States Exhibits 11 and 12 for identification only.

(Thereupon the documents above referred to were received and marked United States Exhibits 11 and 12 for identification respectively.)

Q. (By Mr. Drewes): The returns which you have just handed me, Government's Exhibits 11 and 12 for identification, were brought with you from the files of the collector's office in San Francisco? A. Yes, sir, they were.

Q. Do you have with you, Mr. Mooser, the returns for a partnership of Olender, Hamilton, Kaplan and Gambor, Fresno, California, for the years 1945 and 1946?

A. For the year 1945, yes, under that name, and the one under 1946 is under a different name.

Q. May I see that?

(Testimony of Louis H. Mooser, Jr.)

(Thereupon the documents above referred to were handed to Mr. Drewes.)

Mr. Drewes: Your Honor, may the return of the partnership, Olender, Hamilton, Kaplan and Gambor for the year 1945 be marked for identification?

The Court: It may be marked.

(Thereupon the document above referred to was marked United States Exhibit number 13 for identification.) [14]

Q. (By Mr. Drewes): And the partnership return for the year 1945 you brought with you from the files of the office of collector of internal revenue in San Francisco? A. Yes, sir.

Q. Mr. Mooser, will you see if you can locate the return of the partnership for the year 1946 and bring it to this courtroom tomorrow morning?

A. Yes, I will.

Q. Will you also bring with you tomorrow morning a partnership return of the Army-Navy Store for the year 1942 if you find that there is one in the files at the office of the collector?

Mr. Lewis: There is no partnership for the year 1942.

Mr. Drewes: I beg your pardon, the Army-Navy return is not a partnership return. I have no further questions.

Mr. Lewis: No questions.

(Witness excused.)

GEORGE HORNE

called as a witness for the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury?

The Witness: George Horne, 110 Arbor Drive, Piedmont, accountant.

Direct Examination

By Mr. Drewes:

Q. Mr. Horne, you are a certified public [15] accountant? A. I am.

Q. In the year 1946, Mr. Horne, were you employed by a corporation known as the Asturias Import and Export Corporation?

A. That is correct.

Q. In connection with your employment by that corporation did you maintain the books?

A. I did.

Q. And in response to a subpoena duces tecum have you brought those books with you?

A. Yes.

Q. May I see them, please?

(Witness hands books referred to to Mr. Horne.)

Q. (By Mr. Drewes): Mr. Horne, do the books of the corporation reflect a cash receipt from one Milton Olender in 1946? A. Yes.

Q. Would you please identify that particular

(Testimony of George Horne.)

entry in the books for the benefit of the jury and counsel?

A. How do you wish me to identify it?

Q. Where does it appear and what is the nature of the entry, Mr. Horne?

A. In July, 1946, there was an entry for \$5,000 for a stock purchase.

Q. Stock purchased by whom?

A. By Milton Olender. [16]

Q. Where does that appear in the record?

A. General Journal number 1.

Q. Do the books reflect, Mr. Horne, a subsequent receipt of the same amount from Milton Olender?

A. Yes, they do.

Q. Would you please turn to that particular entry?

A. On December 13, 1946, there was a receipt for \$5,000.

Q. And to what account was that credited?

A. That was credited at that time to a notes payable account.

Q. December 13, you say, 1946?

A. Yes, sir.

Q. Where does that entry appear in the record which you have in front of you?

A. On the cash receipt journal number 3.

Q. Do the books reflect any subsequent disposition of the last item to which you have referred?

A. Later on that amount was transferred to capital stock amount for the capital stock concern.

Q. In the name of Milton Olender?

(Testimony of George Horne.)

A. In the name of Milton Olender.

Q. What was that particular date for that entry?

A. The book entry date was in January, 1948.

Q. Is that the date upon which the stock was issued to Mr. Olender, that you know? [17]

A. I do not believe it was. I believe the stock was issued prior to that time.

Q. Do you know the date?

A. No, I do not.

Q. State if you can, Mr. Horne, if the shares purchased by Mr. Olender July 1, 1946, remained outstanding as of the end of that year, December 31, 1946? A. Yes, they were. [18]

Q. (By Mr. Drewes): And with respect to the entry to which you have testified, cash receipts from Milton Olender on December 13, 1946, is that credit still outstanding as of the 31st day of January, 1946? A. Yes, it was.

Q. I understand I said January. May the record show the question was December 31, 1946. And would your answer be the same?

A. December 31st, 1946.

Q. Referring again to the entry, July 1, 1946, does the record that you have before you show how many shares were purchased by Mr. Olender at that time? A. It was 500.

Q. Do the books which you have in front of you indicate how many shares were received by Mr. Olender in connection with the second transaction in December of 1946?

A. No, sir, the books do not show the number of

(Testimony of George Horne.)

shares issued. Just the transfer from the notes payable, account to the stock account.

Q. You have testified with respect to the entry on December 13, 1946, that the corresponding credit was made to the account notes payable?

A. Yes, sir.

Q. Do you know of your own knowledge whether or not that transaction was intended for a capital contribution by Mr. [19] Olender?

A. I believe that was the intention.

Mr. Lewis: Mr. Horne, will you find for me the transfer——

Mr. Drewes: Mr. Lewis, I beg your pardon. I want to offer that book into evidence.

Mr. Lewis: Okay, fine. I thought you had finished.

The Court: Admitted.

The Clerk: United States Exhibit No. 14 in evidence.

(Thereupon document identified above was received in evidence and marked U. S. Exhibit No. 14.)

Mr. Drewes: I have no further questions.

The Court: Are there any other questions of this gentleman?

Mr. Drewes: I have no further questions.

Cross-Examination

By Mr. Lewis:

Q. Mr. Horne, will you find for me the transfer from the notes payable account to the stock transfer account? A. (Indicating.)

(Testimony of George Horne.)

Q. That was in December? A. 1948.

Q. January, 1948? A. Yes.

Q. Were you employed throughout that time for the corporation? A. Yes, I was. [20]

Q. As certified public accountant?

A. Yes.

Q. Have you audited the books to find the value of that stock as of December 31, 1947?

A. Pardon me, I didn't hear the question.

Q. Did you make an audit of the books of the corporation, Asturias Import-Export Corporation, from which you could tell us the value of that stock as of December 31, 1947?

Mr. Drewes: I object on the grounds it is immaterial, irrelevant.

The Court: Overruled. Did you make such an audit?

The Witness: No, sir.

Q. (By Mr. Lewis): Have you the minute books of the corporation? A. No, sir.

Q. Do you know who has? A. No, sir.

Q. Do you know of your own knowledge that this second \$5,000 payment, December 13, 1946, was a loan? A. Did I know it?

Q. Yes. A. As a loan?

Q. Of your own knowledge.

Mr. Drewes: That is objected to as asked and answered. He testified it was a capital [21] contribution.

Mr. Hagerty: No, I believe he said——

The Court: I will allow the question.

(Testimony of George Horne.)

Mr. Lewis: He put it on the books as the note payable account.

A. From an accounting standpoint that is the only way you could handle it until such time as the stock was actually issued or permit granted for the issuance of stock.

Q. (By Mr. Lewis): Well, do you know what it was intended to be or what it actually was when you made the journal entry December 13, 1946?

A. It was intended to be a capital contribution.

Q. How do you know that?

A. From the conversations at the time it was made.

Q. Why did you enter it on the notes payable account?

A. Because it could not be entered as a capital account until stock was actually issued. There is a period there when the contribution is made and application is made to the corporation commissioner for a permit to issue stock. Until such time as the stock is actually issued I believe the stockholder could withdraw the amount as contributed. After the stock is issued he would not be able to withdraw it.

Q. Did the corporation ever—was the corporation ever in a position to remit, pay him back the amount?

A. I can't answer that question. [22]

Q. Have you in your office any of the audits which you made of this corporation?

A. I have financial statements.

(Testimony of George Horne.)

Q. Can you bring those into court tomorrow, Mr. Horne? Will you bring those financial statements into the court in the morning?

A. Which financial statements do you want?

Q. I want them for the years 1946, 1947, 1948.

A. I have some statements in my possession, in my briefcase.

Q. Could I look at them?

A. Sure (showing to counsel).

Q. Is this on a calendar year—

A. The corporation was on a fiscal year.

Q. That year ended June the 30th?

A. That's right.

Mr. Lewis: Could I look at this just one moment?

The Court: Yes.

(Thereupon, upon the customary admonition to the Jury, an adjournment was taken until 10 o'clock a.m., Tuesday, September 17, [23] 1952.)

September 16, 1952, at 10:00 A.M.

The Clerk: United States vs. Olender. The office has received word from Betty Duncan, No. 2 alternate juror, that she has suffered a gallbladder attack and will be unable to attend court.

The Court: May it be stipulated, gentlemen, that the Juror mentioned by Mr. McGee, the Clerk of the Court, may be excused by the panel from further service in this case?

(So stipulated.)

The Court: The case then may continue with the 12 original jurors empaneled and sworn, as well as the one alternate juror.

GEORGE HORNE

was recalled as a witness on behalf of the Government, previously sworn.

Cross-Examination

(Continued).

By Mr. Lewis:

Q. Mr. Horne, yesterday afternoon, I asked you this question: "Did you make an audit of the books of the corporation of Asturias Import-Export Corporation from which you could tell us the value of that stock as of December 31, 1947?"

And your answer was "No, sir."

Would you like to change that testimony? [24]

A. No.

Q. I have already shown this affidavit to counsel, your Honor. I have here an affidavit. Are you familiar with that?

The Court: Are you familiar with that document?

A. Yes, I am.

Q. (By Mr. Lewis): Will you tell me what it is?

A. I don't know what you would call it, but I imagine it would be an affidavit in regard to the transactions of Asturias Import-Export.

Q. Who made the affidavit? A. I did.

Q. Now, Mr. Horne, in this affidavit which is

(Testimony of George Horne.)

dated the 5th day of October, 1951, and made by you, you state, and I quote:

“As of December 31, 1947, corporation was, in my opinion, hopelessly insolvent. No action was taken by the interested parties—stockholders, creditors or management—to procure the dissolution of the corporation or put it in bankruptcy because of the apparent futility of any action that might have been taken. In my opinion, any interest held in the corporation whether evidenced by capital stock, note or creditor’s claim was totally worthless as of December 31, 1947.”

Is that statement true or not? [25]

A. That is my opinion.

Q. Did you ever use any other surname than Horne? A. Last name you mean?

Q. Yes. A. Yes.

Q. What was that? A. Horenstein.

Mr. Lewis: That is all.

Redirect Examination

By Mr. Drewes:

Q. Mr. Horne, at whose request did you prepare the affidavit from which counsel has just read?

Mr. Lewis: Object to that, your Honor, as incompetent, immaterial and irrelevant.

The Court: Overruled.

Mr. Drewes: You may answer.

A. I believe it was at the request of the attorney that wanted to ascertain certain facts.

Q. What attorneys?

(Testimony of George Horne.)

A. I don't recall the name of the attorney, but I believe the attorney's name was on the statement.

Q. Who did he represent?

The Court: If you know.

A. I don't really remember at that time whether he represented Mr. Olender or whether he was a representative of Mr. Yabroff, Dr. Yabroff. [26]

Q. Who was Dr. Yabroff?

A. He was one other stockholder.

Q. In any event, the affidavit was not prepared at the request of the Government?

A. No, it was not.

Mr. Drewes: I have no further questions.

Recross-Examination

By Mr. Lewis:

Q. You swore to the truth of the affidavit, didn't you? A. I beg your pardon?

Q. You swore to the truth of the statement?

A. Oh, yes.

Mr. Lewis: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Drewes: If your Honor please, in my opening statement I referred to a stipulation which had been entered into between counsel for the government and counsel for the defendant in this matter. At this time I should like to offer the stipulation in evidence and ask that it be marked accordingly, the Government's next in order. I have a copy for the Court if you wish it. At this time, your Honor, I

should like to read it for the record for the benefit of the ladies and gentlemen of the Jury.

The Court: Ladies and gentlemen, counsel for the [27] Government has offered a stipulation in writing signed by the attorneys representing the respective parties to this case, that is, the Government and the defense counsel.

A stipulation has the same force as evidence when entered into formally and with the consent of the parties, and counsel may now read into the record such parts thereof as he desires, and counsel for the defendant similarly may rely upon the stipulation.

A stipulation sometimes saves a great deal of time in the trial of a case. It may be marked.

The Clerk: United States Exhibit No. 15 in evidence.

(Thereupon the stipulation was received in evidence and marked United States Exhibit No. 15.)

Mr. Drewes: The stipulation in part is as follows, ladies and gentlemen, and as I have also indicated the Government, at the proper time in the case, will endeavor to pull the various items together in a more helpful fashion for you.

“This stipulation is entered into by and between the parties to this proceeding (by their respective counsel). The parties are bound by this stipulation for the purposes of this proceeding only, and this stipulation does not preclude either party from offering evidence of any character bearing on or related to wilfulness or lack of wilfulness, or [28] any evidence relating to items of assets, liabilities

or expenditures of Milton H. Olender or Mrs. Betty Olender which are not included in this stipulation. Each party shall have the right to show the sources involved in items in this stipulation.

"1. On the dates shown below Milton H. Olender and his wife, Mrs. Betty Olender, owned the following assets and owed the following liabilities (both at cost):

"Specified assets and liabilities of Milton H. and Betty Olender at close of years 1944, 1945 and 1946.

"Assets. Army and Navy Store (not on books).
Cash in store registers——"

Now, each year which I referred to will, of course, be as of the 31st day of December of that year, the close of that specific year.

"1944, \$2,500. 1945, \$1,000. 1946, \$1,000.

"Cash in bank (net after outstanding checks)
1944, \$19,881.55. 1945, \$28,412.31. 1946, \$2,598.38.

"Merchandise inventory: 1944, \$85,011.26. 1945, \$83,394.64. 1946, \$57,449.59.

"Furniture and fixtures (net after depreciation):
1944, \$1,264.60; 1945, \$393.29; and nothing for 1946.
Then again the totals: \$106,157.41 for [29] 1944;
\$112,200.24 for 1945; 1946, \$60,047.97."

And then the net liabilities of the store:

"Accounts payable \$14,362.70 for 1944. 1945, \$8,074.74. 1946, \$2,204.27.

"Notes payable, 1944, \$13,500. 1945, \$13,500.
1946, nothing.

"Federal Old Age Taxes, 1944, zero; 1945, zero;
1946, \$21.50.

“State Unemployment Taxes, 1944, \$462.23; 1945, \$825; 1946, \$21.50.

“Withholding Taxes, 1944, zero; 1945, zero; 1946, \$386.05.”

Then the total liabilities as of 1944, are \$28,324.93. 1945, \$22,399.74. 1946, \$2,633.32.

Then the net investment for the store: “1944, \$77,832.48. 1945, \$89,800.50. 1946, \$57,414.65.”

Now, additional assets:

“Cash in bank (other than commercial account Army and Navy Store): Bank of America, Oakland Main Office; Checking accounts——”

And there are two:

“Milton H. Olender 1944, \$277.22. 1945, \$8,253.03. 1946, \$5,477.13.”

Then, in an account entitled, or in the name of: “Olender and Alkus: 1944, \$434.58; 1945, \$90.28; 1946, \$2,911.74.” [30]

And now follow four or five savings accounts:

“Milton H. Olender, trustee for James Harold Olender: 1944, zero; \$5,000, 1945; 1946, \$5,050.12.

“Milton H. Olender, trustee for Richard Raymond Busby: 1944, zero; 1945, \$5,000; 1946, \$5,050.12.

“Milton H. Olender, trustee for Audrey Elaine Olender: 1944, zero; 1945, \$5,000; 1946, \$5,050.12.

“Mrs. Betty Olender, 1944, zero; 1945, \$5,000; 1946, \$10,070.06.”

Then an account in:

“Bank of America, Fresno Main Office, savings account number 129, Milton Olender, 1944, \$3,111.09; 1945, \$3,142.27; 1946, \$3,173.76.”

Now, the total of those items consisting of various bank accounts is as follows:

“1944, \$3,822.89; 1945, \$31,485.58; 1946, \$36,783.05.”

Now, next is a series of items, for the most part stocks of one kind and another, as follows:

“Bank of America, common, 1944, zero; 1945, zero; 1946, \$37,437.50.

“Kingston Products Company, common, 1944, zero; 1945, zero; 1946, \$850.

“Blair and Company, Inc., common: 1944, [31] zero; 1945, \$812.50; 1946, \$1,187.25.

“Compania Azucarera Vicana, 1944, zero; 1945, \$337.50; 1946, \$337.50.

“Victor Equipment Company, 1944, zero; 1945, zero; 1946, \$570.15.

“Contra Costa Associates, 1944, zero; 1945, zero; 1946, \$5,000.”

Finally, under this particular section:

“Packard Motors Company, common, 1944, \$552.95; '45 and '46, zero, zero.”

The totals of these figures areas follows:

“1944, \$552.95; 1945, \$1,150; 1946, \$45,382.40.”

The next item:

“United States savings bonds, series E, 1944, \$693.75; 1945, \$768.75; 1946, \$768.75.”

The next item:

“Real estate and improvements (exclusive of Army-Navy Store): 1944, \$35,275; 1945, \$35,275; 1946, \$71,261.31.”

Now, from these figures are taken accumulated

depreciation as reported on tax returns in the following amounts:

“1944, \$3,675; 1945, \$4,400; 1946, \$2,750.”

Which gives us the following net figures for real estate:

“1944, \$31,600; 1945, \$30,875; and 1946, \$68,511.31.”

Now, the next item is: [32]

“Paid up life insurance with New York Life Insurance Company, 1944, zero; 1945, \$15,833.46; 1946, \$15,833.46.”

“Loans receivable Contra Costa Associates; 1945 and 1944, zero, zero, and in 1946, \$1,000.”

“Household furniture (except purchased from W. & J. Sloane): 1944, \$5,000; 1945, \$5,000; 1946, \$4,000.

“Household furniture (purchased from W. & J. Sloane, 1944, zero; 1945, zero; 1946, \$24,701.67.”

Then follows two items only of liabilities.

“Loans payable—Mrs. J. Olender, 1944 and 1945, \$5,000; 1946, \$15,500.

“Account payable—W. & J. Sloane, 1944 and 1945, zero, zero, and 1946, \$24,701.67.”

Next, the stipulation reads as follows:

“2. It is stipulated that Milton H. Olender and his wife, Mrs. Betty Olender, had in their possession at the close of the years involved United States Treasury bonds in the face amount set forth below. Each party shall have the right to offer evidence as to the ownership or source of the funds with which the bonds were purchased.”

Now, there are four such items. They are all United States Treasury Bonds. The first: [33]

“U. S. Treasury 2 per cent 1951-53: 1944, '45, '46, the amount is \$10,000 in each case.

“United States Treasury two and one-quarter per cent 1959-62: 1944, zero; 1945, \$58,000; 1946, \$33,000.

“U. S. Treasury two and one-quarter per cent 1956-59; \$1,000 in each year.”

And finally:

“United States Treasury 2 per cent 1952-54, \$13,000 as to each year.”

The totals of those particular items are as follows:

“1944, \$24,000; 1945, \$82,000; 1946, \$57,000.”

The next item of the stipulation is as follows:

“During the years 1945 and 1946 Milton H. Olender and Mrs. Betty Olender, his wife, made expenditures which were not deductible for Federal Income tax purposes in the following amounts:—”

These are non-deductible items—“1945, \$19,081.32; 1946, \$23,985.63.”

Now, the figures which I have just read included Federal income taxes, which as you also understand, are non-deductible items.

The final section of the stipulation sets forth a number of items which were not included in the stipulation and I shan't read those to you. Possibly counsel for the defendant wishes to. [34]

BENJAMIN H. NEIDEN

was called as a witness on behalf of the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the Jury?

A. My present occupation, sir?

Q. Yes.

A. Benjamin H. Neiden, residing at 48 Margaret Drive, Walnut Creek. Manufacturer's representative, women's apparel.

Direct Examination

By Mr. Drewes:

Q. Mr. Neiden, during its active existence you were associated with the Asturias Corporation, were you? A. I was, sir.

Q. In what capacity?

A. I was vice president, treasurer and general manager of the corporation.

Q. In response to a subpoena duces tecum which was served upon you have you brought with you the stock records book of that corporation?

A. I have, sir.

Q. May I see it, please?

(Thereupon the witness handed the document above-referred to to Mr. Drewes.)

Q. (By Mr. Drewes): Has this record been in your possession since you were associated with the corporation? [35]

(Testimony of Benjamin H. Neiden.)

A. It was, with the exception of a short period of time during which it was in the possession of Jefferson E. Peyser, who was attorney for the corporation.

Q. He was attorney for the corporation?

A. He was attorney for the corporation.

Q. Did Mr. Peyser hold any other position? Was he an officer of the corporation?

A. I believe he was secretary, but I would have to check the records of the minutes. I believe he was secretary of the organization. I can check that if that is of importance to you.

Mr. Drewes: At this time the Government will offer in evidence the stock record book of the Asturias Import Export Corporation.

The Court: So ordered.

The Clerk: United States Exhibit No. 16 in evidence.

(Thereupon the document above referred to was received in evidence and marked United States Exhibit No. 16.)

Mr. Drewes: I should like to call the attention of the Jury, your Honor, that certificate number 3 of this stock book, the stub proffering certificate number 3 indicates that 500 shares were issued to Milton H. Olender, July 17, 1946. The certificate reads as follows; continuing from that point:

“From whom transferred, originally dated July, 1946”—the further, “number original certificate 3. [36] Number original shares, 500.”

(Testimony of Benjamin H. Neiden.)

Following "Received certificate number 3 for 500 shares this blank day of blank, 1946" not signed.

Certificate number 12 likewise is for 500 shares issued to Milton H. Olender dated July 23rd, 1947. The other blanks are not filled in. Attached to both certificates No. 3 and No. 12 are United States Internal Revenue stamps in the amount of \$5.50.

Q. (By Mr. Drewes): Have you also brought with you the minutes of the Asturias Corporation?

A. I have.

Q. May I see them, please?

(Thereupon the witness handed the document referred to above to Mr. Drewes.)

Mr. Drewes: Stipulated that the minutes may go into evidence as the Government's next in order.

The Court: So ordered.

The Clerk: United States Exhibit No. 17 in evidence.

(Thereupon the minutes above referred to were received in evidence and marked United States Exhibit No. 17.)

Mr. Drewes: I should like to read, your Honor, from the minutes of two meetings of the Board of Directors of the corporation.

Ladies and gentlemen, the following appears from the records of a special meeting of the Directors of the Asturias Corporation which was held on the 23rd day of April, 1947, [37] at 4:15 p.m. at Room 614 of the Mills Building in San Francisco:

(Testimony of Benjamin H. Neiden.)

“The president then called attention to the action of the stockholders authorizing the application for the issuance of all unissued capital stock of this corporation to the public for cash less a selling commission not to exceed 20 per cent.

“He also called attention to the action of the board of directors on February 17th, 1947, whereby application was filed for the issuance of 1500 shares for cash to the following named persons. 600 shares to Mildred Lane, 500 shares to Milton H. Olender, and 400 shares to Ray Monson. He indicated that the application had not as yet been filed and therefore suggested that one application be filed for said shares and the balance of shares outstanding.

“On motion duly made, seconded and carried the following resolution was unanimously adopted.

“ ‘Be it resolved that the vice president of this corporation be, and he is hereby authorized to make application to the Commissioner of Corporations for the issuance of the following shares of the capital stock of this corporation as follows: [38]

“ ‘1500 shares for cash to the following named persons to net the corporation one hundred per cent thereof.

“ ‘600 shares to Mildred Lane, 500 shares to Milton H. Olender, 400 shares Ray Monson.’ ”

And the earlier action of the Board referred to in that resolution which I have just read to you is found in the minutes of the special meeting which

(Testimony of Benjamin H. Neiden.)

was held the 17th day of February, 1947, at the hour of 10:50 p.m. at Room 614 in the Mills Building, San Francisco, California, and I will read this part of it:

“On motion by Director Yabroff, seconded by Milton H. Olender the following resolution was unanimously adopted.

“Be it resolved the Secretary of this Corporation be, and he is hereby authorized to make application to the Commissioner of Corporations for the issuance of 3000 shares of the capital stock of this corporation as follows:

“1500 shares for cash to the following named persons:

“600 shares to Mildred Lane, 500 shares to Milton H. Olender, 400 shares to Roy Monson.”

I should also like to read briefly a resolution which is found in the minutes of a special meeting of the board of [39] directors which was held on the 31st day of July, 1947, at Room 614, Mills Building, San Francisco, as follows:

“On motion made by Milton H. Olender, seconded by Jefferson E. Peyser, the following resolution was presented.

“Be it resolved that as at the close of business July 31, 1947, this corporation cease all operations, and that the manager be instructed to incur no further obligations of any kind or character, and be it further resolved that the office of said corporation be closed and the premises vacated——”
and so forth.

(Testimony of Benjamin H. Neiden.)

Q. (By Mr. Drewes): Mr. Neiden, have you also brought with you a copy of the annual report of the corporation as of July, 1947?

A. I have.

Q. May I see, that, please?

(Thereupon the witness handed the document above referred to to Mr. Drewes.)

Mr. Drewes: United States will offer the copy of the officers' annual report as the Government's next in order.

The Court: It may be marked.

The Clerk: United States Exhibit No. 18 in evidence.

(Thereupon the document above referred to was received in evidence and marked United States Exhibit No. 18.)

Mr. Drewes: I read very briefly from the first page of [40] the annual report of this corporation as follows:

“At the December, 1946, meeting it was agreed that the balance of the shares of stock of this corporation be sold and the factory purchased by the Asturias Import Export Corporation. At this meeting \$19,400 was loaned by our stockholders to our corporation. These notes were to be exchanged for stock certificates when the stock permit was granted.”

I have no further questions of this witness.

(Testimony of Benjamin H. Neiden.)

Cross-Examination

By Mr. Lewis:

Q. Mr. Neiden, I hand you the stock book of the Asturias Import Export Corporation, and with reference to stock certificates 3 and 12 you will note Mr. Olender did not sign for the stock on the stub there. Have you any way of telling when Mr. Olender received his stock?

A. No, I have no way of telling you exactly the date that stock was received.

Q. Are you familiar with the financial affairs as the president, manager, or vice president and manager of the corporation?

A. I would say so, yes.

Q. Do you know what the financial position of the company was on December 31, 1947?

Mr. Drewes: Objected to as irrelevant. [41]

The Court: Overruled.

Q. (By Mr. Lewis): Do you know what the financial position of the corporation was as of December 31, 1947?

A. Do you wish me to answer that question?

The Court: Yes.

A. We had ceased operations in July 31, 1947. At that time this company was definitely in financial jeopardy. The indebtedness of Asturias Import Export Corporation ran somewhere between \$6,000 and \$7,000. I do not have the exact figures here, but I am sure that can be ascertained from the records of the corporation.

(Testimony of Benjamin H. Neiden.)

It was felt, apparently, by the Board of Directors that the organization could not proceed further and was either insolvent or additional capital had to be added. The corporation did not continue active function after July 31, 1947.

Mr. Lewis: That is all.

The Court: What is your definition of insolvent? You said the corporation was insolvent. What is your definition?

The Witness: The inability to meet current obligations.

The Court: As they matured?

The Witness: As they matured.

Redirect Examination

By Mr. Drewes:

Q. Stock certificate number 3, Mr. Neiden, bears the date July 17, 1946, in the same handwriting, ink, in which the balance of the stub is filled out and I show you [43] that number 12 bears the date July 23, 1947. Do you have any reason to doubt the accuracy of those two dates? A. I do not.

Mr. Drewes: No further questions.

Mr. Lewis: No further questions.

The Court: You are excused.

(Witness excused.)

MONROE L. CAHN

was called as a witness on behalf of the Government, sworn.

The Clerk: Will you state your name, your address and your occupation to the Court and to the Jury?

A. Monroe L. Cahn, 72 Seventh Avenue, San Francisco; credit manager, I. Magnin and Company.

Direct Examination

By Mr. Drewes:

Q. Mr. Cahn, you have appeared here in response to a subpoena duces tecum. You were asked to bring with you the records of I. Magnin and Company with respect to the accounts of Milton Olender and/or his wife, Mrs. Betty Olender, for the years 1945 and '46. Have you brought those records with you? A. No, sir.

Q. Why not?

A. We don't have them any longer.

Q. What has happened to the records? [43]

A. Well, we usually keep our records for four years and after that they are destroyed.

Q. And the records to which I have referred have been destroyed pursuant to the policy of Magnin's that you have outlined? A. Yes, sir.

Mr. Drewes: I have no further questions.

Mr. Lewis: No questions.

The Court: Do you have microfilms of the records?

(Testimony of Monroe L. Cahn.)

The Witness: We do now because we shifted our billing system about a year ago.

The Court: But you haven't any micros of the accounts in question?

The Witness: No.

Q. (By Mr. Drewes): You kept no copies of any kind of those records?

The Witness: Well, we don't have the original ledger sheets.

Mr. Drewes: And you have no copies of those ledger sheets?

The Witness: I haven't, no.

Mr. Drewes: Does the company have?

The Witness: No.

Mr. Drewes: Will you wait a few minutes until the next witness is finished? [44]

VIRGINIA DAVIS

was called as a witness on behalf of the plaintiff, sworn.

The Clerk: State your name, your address and your occupation to the Court and to the jury.

A. Virginia Davis, 1000 Green Street. I am a medical secretary.

Direct Examination

By Mr. Drewes:

Q. Mrs. Davis, in 1948 were you employed by I. Magnin and Company in San Francisco?

A. I was.

(Testimony of Virginia Davis.)

Q. Were you so employed throughout that year?

A. Yes.

Q. In what capacity were you employed by that company?

A. I was in the credit department in charge of the correspondence, anything to do with credit complaints or inquiries.

Q. Would you tell us a little bit further specifically what your duties were? What type of inquiries, for example?

A. Well, inquiries as to accounts that would come in or errors on accounts, and then I would have to take——.

Q. What did you do, for example, when an inquiry as to errors would come in?

A. Check the information in the letter against the ledger, and then inform the person as to whether it was correct or to be corrected or what the error was.

Q. The inquiries coming in were referred to you? [45]

A. Well, to myself and others.

Mr. Hagerty: Just a moment, please. If your Honor please, I will object to this line, that is subject to a motion to strike, on the grounds that the present time is incompetent, irrelevant and immaterial.

The Court: You reserve your motion, counsel.

Mr. Drewes: I am laying a foundation.

The Court: To all of this testimony.

Q. (By Mr. Drewes): Some of the inquiries received were referred to you?

A. Yes.

(Testimony of Virginia Davis.)

Q. Then what did you do? You prepared the replies yourself? Did you dictate the replies?

A. Yes, I did.

Q. And did you personally gather the information requested in the inquiries referred to you?

A. Yes.

Q. Did you always do the work yourself or did you sometimes—

A. Not always, no.

Q. You referred some of the work to others?

A. That is correct.

Q. And when the work was done did you check it?

A. Yes.

Q. I want to show you a letter dated November 9, 1948, on [46] the letterhead of I. Magnin and Company and ask you if you recognize the signature thereon?

A. Yes, that is my signature.

Q. The signature of Virginia Born. I take it, Mrs. Davis, you have married since that time?

A. Yes, I have.

Q. And will you please examine the enclosures. You will note that the original letter has marked "enclosures," and attached thereto are some papers. Will you tell me what those are?

Mr. Hagerty: Just a moment, I will object. I haven't seen it. May I see it, please?

Mr. Drewes: It hasn't been offered in evidence, yet.

The Court: Counsel may examine it.

Mr. Hagerty: I have a right to see it before she starts testifying from it.

(Testimony of Virginia Davis.)

(Thereupon Mr. Drewes gave the document above referred to to Mr. Hagerty.)

The Court: Ladies and gentlemen, we might take the morning recess at this time with the same admonition not to discuss the case under any condition or circumstances, and not to form an opinion until the matter is submitted to you.

(Short recess.) [47]

Mr. Hagerty: For the purposes of the record, I will renew my objection as to this witness testifying from these documents before me in any respect on the grounds that they are hearsay, they are not records kept in the regular course of business.

The Court: May I see them?

Mr. Hagerty: Yes.

They are not the best evidence because they are not the original records.

The Court: The foundation has been laid in light of the absence of the original records.

Mr. Drewes: That is my purpose, your Honor, my intention.

The Court: Objection overruled.

Q. (By Mr. Drewes): Mrs. Davis, you have testified that requests for information as to statements and accounts were sometimes turned over by you to others, to employees of I. Magnin's. When the information requested was returned by those other employees to you, were the original statements included when they were returned to your desk?

A. You mean the original ledgers?

(Testimony of Virginia Davis.)

Q. Yes. A. Not necessarily, no.

Q. Will you please examine the enclosures, Mrs. Davis, and tell me if they appear to be on the letter-head of I. [48] Magnin & Company or if that is the statement of I. Magnin & Company?

A. That is correct.

Q. That is a statement form?

A. That is a statement form.

Q. Now, Mrs. Davis, do you have any recollection as to the preparation of that particular—and signature of that particular letter or the enclosures?

A. I have a slight recollection of Mr. Whiteside's request. I certainly signed it. And, I might add, that in a case of this type I would be liable—most liable to very carefully check the contents.

Q. Do you recall whether or not you actually obtained the information for the preparation of that enclosure or was it done by someone else?

A. No, that was delegated to one of the stenographers.

Q. In a case of that kind would you have checked the accuracy of that statement before signing the letter and mailing it?

A. I am quite certain that I would, yes.

Mr. Drewes: Your Honor, the Government will offer the letter and enclosure into evidence, limited to the purchases shown on the enclosure for the year 1946. It runs beyond 1946. There are some

(Testimony of Virginia Davis.)

items shown in 1947, which, of course, are not [49] material.

The Court: Subject to the objection.

Mr. Hagerty: Might I question the witness a little bit in reference to them first, please?

The Court: Certainly.

Q. (By Mr. Hagerty): Now there are several columns shown on these invoice forms, are there not? A. Yes.

Q. Mrs. Born—is it Virginia Born

A. Yes.

Q. The one column indicates “Returned Merchandise” and “Payments.” You could not tell from those figures whether there had been a cash payment or a return of merchandise, could you?

A. Yes. It is indicated on the first column.

Q. And if the first column does not indicate it, you could not identify the figure in the returned merchandise and payment column?

A. I believe they are all identified.

Q. What?

A. I believe they are all identified, either as returned merchandise or cash, which was a word used for any payment to account.

Q. You yourself testified that you did not make these forms up, did you?

A. I honestly don't remember if I made those particular forms [50] up. I couldn't say that I did. I imagine it was done under my direction.

Q. You imagine. Now you worked in the San Francisco store, did you not? A. Correct.

(Testimony of Virginia Davis.)

Q. And by the context of this letter these records purport to be records of the Oakland store, don't they?

A. That's correct, and a portion of San Francisco.

Q. A portion of San Francisco?

A. (Witness nods head in the affirmative.)

Q. These original records then should have been kept in the Oakland store, is that not right?

A. They could have been but we also did billing for Oakland at one period. I am not quite concise on exactly when.

Q. In other words, you don't know whether these records were kept in San Francisco or in the Oakland store, do you?

A. I couldn't swear to it.

Q. And, in fact, everything that you testified to about these records is pretty much a matter of doubt in your mind, is that not right?

A. Well, I wouldn't exactly call it doubt. I must have seen the records or at least the statement that you hold in your hand or I wouldn't have written the letter to cover them.

Q. I mean as you sit there do you know even, though, the years pertaining to them—do you [51] know? A. Yes, I do, from 1946 to 1948.

Q. '46 to '48? A. Uh-huh.

Q. Do you know the name of the account?

A. Yes.

Q. What is the name?

A. Olender—(spelling) O-l-e-n-d-e-r.

(Testimony of Virginia Davis.)

Q. I see. Do you know whether Mr., Mrs., or Miss?

A. Mrs. Olender, I believe.

Q. Mrs. Did you know that Miss Olender used the account, too?

A. I don't recall that specific thing.

Q. You could not tell from these documents whether or not the purchases were made and paid for by Miss Olender who is an emancipated minor, would you?

A. No.

Q. How did you go about first preparing this record; what was the first thing that brought this about?

A. Well, it should have been a request from Mr. Whiteside or from the Oakland store, probably, to the credit office and then referred to me for compiling figures necessary.

Q. You don't know whether Mr. Whiteside came to you and made the request or——

A. No, I don't.

Q. ——or whether he had gone to the Oakland store. [52]

A. I know Mr. Whiteside didn't come to me. I don't remember seeing him before it must have come through.

Q. You know who Mr. Whiteside is?

A. Yes, I do.

Q. And this is probably the first time you have ever seen him?

A. Yes.

Q. Although you had written a letter addressed to him?

A. That is correct.

Mr. Hagerty: No further questions.

(Testimony of Virginia Davis.)

Mr. Drewes: The Government will renew its offer at this time.

The Court: The offer may now be marked in evidence subject to the limitations, that is to say, for the year 1946.

Mr. Drewes: 1946.

The Clerk: United States Exhibit No. 19 in evidence with the limitation stated.

(Letter and enclosure referred to were marked U. S. Exhibit No. 19 in evidence.)

Mr. Drewes: I have no further questions.

The Court: The witness is excused?

Mr. Drewes: The witness is excused.

Mr. Lewis: Yes.

Mr. Hagerty: Yes. [53]

(Witness excused.)

Mr. Drewes: May I state for the record, your Honor, that the exhibit which has just been admitted into evidence for the year limited to the year 1946 shows aggregate payments on the account in the amount of \$863.73.

Mr. Hagerty: We will stipulate to that, your Honor.

LOUIS H. MOOSER, JR.

called on behalf of the Government, and having been previously duly sworn, testified further as follows:

The Court: This witness has been sworn.

The Clerk: Mr. Mooser, will you please restate your name?

A. Louis H. Mooser, Jr.

(Testimony of Louis H. Mooser, Jr.)

Direct Examination
(Resumed)

By Mr. Drewes:

Q. Yesterday, Mr. Mooser, you were asked to return today and bring with you the 1946 partnership return of the Olender, Gambor, et al., partnership. Do you have that with you?

A. Yes, sir, (producing).

Mr. Drewes: The partnership return of 1946, which has just been identified, your Honor, we ask that it be marked for identification.

The Court: So ordered.

The Clerk: U. S. Exhibit No. 20 for identification only. [54]

(Thereupon 1946 partnership return referred to was marked U. S. Exhibit No. 20 for identification only.)

Q. (By Mr. Drewes): Mr. Mooser, apparently there was a slight misunderstanding, confusion, yesterday. I asked you, you may recall, if you had brought with you the 1942 return of the Army-Navy Store in Oakland, and you told me that you had not. However, just prior to that, you may recall, you had handed me a group of returns for Mr. and Mrs. Olender for earlier years and subsequently found this return which had been marked Exhibit 6 (handing to witness). I will ask you if that is the Army-Navy return which you brought with you yesterday? A. Yes, it is.

Q. Thank you.

(Testimony of Louis H. Mooser, Jr.)

We will renew our offer as Exhibit 6.

Mr. Lewis: Object to it, your Honor, as being beyond the issues of the case. This is 1942 return——

Mr. Drewes: Your Honor, that is——

Mr. Lewis: It is incompetent, immaterial, irrelevant.

Mr. Hagerty: The indictment is limited to 1945 and '46. This is 1942.

The Court: What is the purpose of it, counsel?

Mr. Drewes: Yes, your Honor. Your Honor has already admitted into evidence a number of other returns for the years—one on the 1942, and two for '43 and '44. As I [55] stated in my opening remarks, the base year is 1942—pardon me, 1944. However, we wish to support that by putting into the record the income taxes of the gross income reported and taxes paid by the taxpayers beginning in 1942 because, as will later appear, we will offer into evidence a net worth return for the year 1941 prepared by the taxpayer and, of course, by adding purported income from 1941 to 1944 we will support our 1944 base year, and that is the base.

The Court: For that purpose it may be admitted, and, counsel, you will have for the purpose of illustration and in order to follow the sequences in evidence a graphical representation or a chart of some kind.

Mr. Drewes: Yes. At the proper time we will attempt to bring all of our evidence together so that it will have meaning for the jury.

(Testimony of Louis H. Mooser, Jr.)

The Court: So the jury will have it correlated in some form.

Mr. Drewes: I fully appreciate that our stipulation was not totalled either, and we did not total it because there is more evidence to come in. When the Government has rested, we will put it all together and show what we contend we have proved.

The Court: That exhibit may be marked appropriately.

The Clerk: What is the exhibit?

Mr. Drewes: It will be offered as marked, No. 6, and we [56] reoffer No. 6.

The Clerk: United States Exhibit No. 6 now in evidence.

(Thereupon U. S. Exhibit No. 6 was received in evidence.)

Q. (By Mr. Drewes): Now, Mr. Mooser, have you also brought with you certificates of assessment and payments for the years 1942 through 1947 for Milton Olender and Betty Olender?

A. Yes, I have.

Q. May I see them, please?

A. (Witness producing.)

Mr. Drewes: It has been stipulated, your Honor, that these certificates of assessment may go into the record.

I will offer the certificate as to Milton and Mrs. Olender for the years 1941 and '42 first and ask that they be admitted separately.

The Court: It may be marked.

(Testimony of Louis H. Mooser, Jr.)

The Clerk: U. S. Exhibit No. 21 in evidence.

(Thereupon certificate of assessment referred to was marked United States Exhibit No. 21 in evidence.)

Q. (By Mr. Drewes): And next a certificate as to Milton Olender.

The Court: So ordered.

The Clerk: U. S. Exhibit No. 22 in evidence.

(Thereupon certificate referred to was received in evidence and marked U. S. Exhibit No. 22.) [57]

Mr. Drewes: Finally as to Mrs. M. H. Olender—

I might state for the jury, your Honor, that certificates of assessment and payments are simply certificates prepared by the office of the Collector setting forth as to the taxpayer the appropriate years the estimated tax for each year and the tax actually paid, and that is simply a record for the appropriate years of the taxes estimated and paid by the defendant and by Mrs. Olender.

The Clerk: U. S. Exhibit No. 23 in evidence.

(Thereupon certificate of assessment referred to was received in evidence and marked U. S. Exhibit No. 23.)

Mr. Drewes: Mr. Lewis just pointed out to me as to the year 1945 included in this particular exhibit we also included the figures in the stipulation.

(Testimony of Louis H. Mooser, Jr.)

He wanted to be sure that we didn't count them up twice. In his behalf I make that statement.

I have no further questions of Mr. Mooser.

The Court: This witness is excused. Thank you.

(Witness excused.)

CHARLES R. RINGO

called by the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and jury.

A. Charles R. Ringo, 540 Arlington Avenue, Berkeley, [58] California, attorney-at-law and certified public accountant.

Direct Examination

By Mr. Drewes:

Q. You are a certified public accountant, Mr. Ringo? A. I am.

Q. And Mr. Ringo—

Mr. Hagerty: I would like to make an objection to any testimony from this witness at this time, your Honor, on the ground of privilege. He is an attorney-at-law and the defendant was a client of his, and under the circumstances it is a privileged communication, and I don't think under the law he is entitled to make any statement here from the stand against this defendant.

The Court: Let me have the foundation first. I will reserve my ruling.

Q. (By Mr. Drewes): And where are your offices, Mr. Ringo?

(Testimony of Charles R. Ringo.)

A. At 1212 Broadway in Oakland.

Q. With whom are you associated, if anyone?

A. D. A. Sargent & Company.

Q. D. A. Sargent & Company, and what is their business?

A. Certified public accountants.

Q. You are also an attorney-at-law?

A. I am.

Q. You are admitted to practice in the State of California?

A. I am admitted to practice in the State of California. [59]

Q. When were you so admitted? A. 1943.

Q. 1943? A. Yes.

Q. Is Mr. Sargent an attorney-at-law?

A. No.

Q. How many associates are there in the firm of Sargent & Company?

A. Well, what do you mean associated—associated in what way?

Q. How many partners are there?

A. Well, at the time I worked on this case, just myself and Mr. Sargent.

Q. And I take it from your answer that the staff has been increased since that time?

A. Well, they haven't all been members of the firm.

Q. Is Mr. Sargent an attorney-at-law?

A. No.

Q. Was the firm of Sargent & Company employed by the defendant in the years 1947 or '48?

(Testimony of Charles R. Ringo.)

Mr. Hagerty: Objected to as leading and suggestive, your Honor.

The Court: Overruled.

A. He came to the firm and saw me up there.

Q. (By Mr. Drewes): When was that, approximately? [60] A. In the early part of 1948.

Q. Did Mr. Olender come directly to you or did he go to Mr. Sargent?

A. I believe first he went to Mr. Sargent. Mr. Sargent turned it over to me.

Q. He first went to Mr. Sargent?

A. That's right.

Q. And as a result of Mr. Olender having gone to Mr. Sargent's office, was a contract entered into by the terms of which the Sargent firm undertook to do certain work for Mr. Olender?

A. Well, I don't know just how you mean to express that. There was no written contract on it.

Q. Well, there was an agreement—strike that. As a result of Mr. Olender coming to you the office of the Sargent firm, did an agreement result whereby the Sargent firm undertook to do some work for Mr. Olender?

A. Well, I did all the work on it. If you mean by that—

Q. I take it your answer is that there was an understanding or agreement that you would do some work? A. That's right.

Q. Will you state for the record the type and nature of the work which was requested of you or which you agreed to do?

(Testimony of Charles R. Ringo.)

A. I was requested to help make out a net worth statement, work out his—try to work out his net worth. [61]

Q. His comparative net worth?

A. That's right.

Q. And for what period, if you recall?

Mr. Hagerty: If your Honor please, I will object to this. I think that whatever foundation had to be made out has already been made out. This is going into the material——

The Court: I will allow this last question as to the period.

A. I believe it was 1942 through 1947. Without seeing the figures I would have to refresh my memory.

Q. (By Mr. Drewes): And when you say a comparative net worth, comparative net worth statements, what is entailed in preparing such statements?

Mr. Hagerty: Now,——

Q. (By Mr. Drewes): What kind of work is necessary or required?

Mr. Hagerty: If your Honor please, I will object to this as the foundation having been passed and I will ask permission to ask the witness further questions on voir dire in reference to the arrangements between him and the defendant.

The Court: You may.

Q. (By Mr. Hagerty): Mr. Ringo, you stated to us that you were an attorney and also an accountant, is that true? A. That's correct.

(Testimony of Charles R. Ringo.)

Q. Do you have one of your business cards with you? [62] A. I do.

Q. May I see it? A. (Producing).

Mr. Hagerty: For the purposes of the record, I would like to read this card.

“Charles R. Ringo, CPA,” and underneath it is, “Attorney-at-law,” and under that,

“D. A. Sargent & Company, certified public accountants,” and the address, “1212 Broadway, Oakland, California.”

Q. Is that the same card you had when you first met the defendant, Mr. Olender?

A. That’s correct.

Q. That was the same business card you used?

A. That’s right.

Q. And in prominent letters under your name is the statement being an attorney-at-law?

A. That’s correct.

Q. When you first talked to Mr. Olender did he ask you if you were an attorney-at-law?

A. He did.

Q. And at that time did he tell you he wanted an attorney-at-law who knew something about accounting? A. That’s right.

Q. After you had told him that you were and that you knew both subjects, law and accounting, did he retain you? [63] A. That is correct.

Q. And at that time the relationship of attorney and client was set up?

Mr. Drewes: Well, I submit—I object to that,

(Testimony of Charles R. Ringo.)

your Honor, as calling for the opinion and conclusion of the witness.

The Court: Sustained.

Mr. Hagerty: I think that I have laid the foundation, your Honor, for that relationship, and again I will renew my objection to any disclosure by this witness as to any affairs that he conducted or handled for the defendant on the grounds of privilege.

Mr. Drewes: It is my understanding of the law, your Honor, that it is a factual situation. The fact that the witness is a member of the Bar is itself immaterial. The issue is what did he do as a result of his employment. In many, many cases where attorneys——

The Court: What did you do, Mr. Ringo?

A. In the first place I asked Mr. Olender to submit me figures of estimates of his net worth, and then I went over his affairs with him. I will say that all the figures submitted are purely Mr. Olender's figures. There was no chance of auditing here because of the nature of the transactions.

The Court: Your work then resulted in compilation of figures? [64]

A. That's correct.

The Court: The objection is overruled.

Q. (By Mr. Hagerty): Mr. Ringo, you are a specialist in tax matters, is that not true?

A. That's correct.

Q. And you handle the legal accounting end of tax matters?

A. That's correct.

Mr. Drewes: I understood your Honor to rule on the matter.

(Testimony of Charles R. Ringo.)

The Court: Well, he is entitled to ask questions for the purposes of the record if he desires to.

Mr. Hagerty: This is a further amplification of the relationship, your Honor.

Q. And did Mr. Olender hire you as an attorney for that very purpose, to look into his accounting features because of tax problems?

Mr. Drewes: Objected to as calling for——

A. He hired me to look into his tax problems, that's right.

Mr. Drewes: ——as calling for the opinion and conclusion.

Mr. Hagerty: Well, under the circumstances, your Honor, I feel that we have made out a case of the attorney-client relationship.

Mr. Drewes: I ask the last response go out as being [65] the opinion and conclusion of the witness, and I objected and the witness kept on answering.

The Court: Objection overruled. I think the witness may testify.

Mr. Hagerty: I didn't hear your Honor.

The Court: The witness may testify under the circumstances. His testimony is to be limited to accounting matters. And if there be any matters involving the relationship of attorney and client, I will rule on those matters as and when they appear.

Mr. Hagerty: And for the purposes of the record then, your Honor, may we note an exception?

The Court: Yes.

(Testimony of Charles R. Ringo.)

Q. (By Mr. Drewes): Mr. Ringo—

Mr. Hagerty: If your Honor please, as a further consideration of that point, might I put the defendant on himself to tell what his version and understanding of the relationship was?

The Court: Not at this juncture.

Mr. Hagerty: Not at this time.

The Court: No.

Q. (By Mr. Drewes): Mr. Ringo—

Mr. Hagerty: May I for the purposes of the record note a further exception on that, your Honor?

The Court: Yes. [66]

Q. (By Mr. Drewes): To the best of your recollection, Mr. Ringo, when were you first—when were you or the firm of D. A. Sargent & Company first retained by the defendant?

A. The early part of 1948.

Q. And you have already on voir dire testified that you were employed by him for the purpose of constructing comparative net worth statements?

A. That's right.

Q. And what period of time was covered by your work?

A. I believe now that the period I covered was 1942 through 1947. I would have to see the net worth statements to refresh my memory on that, but I believe that is true.

Q. That is your best recollection at the present time? A. That's correct.

Q. In the course of your endeavors did you at-

(Testimony of Charles R. Ringo.)

tempt, Mr. Ringo, to reconstruct the defendant's income for each of those years in question?

A. Well, now——

Q. Just answer the question, Mr. Ringo, and then you can explain any way you wish.

A. It takes a little explaining to show just—to say what I did. I don't want to make a positive statement.

The Court: Answer and then explain.

A. I will say I made some attempts, yes.

Q. (By Mr. Drewes): What method did you use in making—in [67] attempting to accomplish that objective?

A. I first asked Mr. Olender to bring me in, to the best of his recollection, the statements of his net worth for each—at the end of each year showing his figures as he thought they were. Then I got hold of his bank statements, and by talking to him and asking him questions I tried to rearrange these figures so as to get the correct figures for the time, because necessarily on an individual that way it would be absolutely impossible for the individual to come right out now and say, this is it. I was trying to reconstruct.

Q. Why did you ask him to bring net worth figures for each year, Mr. Ringo?

A. In order to reconcile his income with his net worth.

Q. Why did you make an audit—strike that. I take it you did not make an audit of his books and records?

(Testimony of Charles R. Ringo.)

A. No, I did not make an audit of the books and records.

Q. Will you explain why you did not?

A. Well, in a great many of these transactions, they were purely cash transactions by use of currency, and so forth, and it would be impossible to really verify figures.

Q. Then you made a preliminary survey of his books and records and discussed his books and records with Mr. Olender before you undertook to reconstruct these net worth statements, is that correct?

A. The only books and records he had would be on the [68] business. As to his personal affairs, there would be no books and records. But I did look them over, yes.

Q. And you say a great many of these transactions were not on the books and records. What transactions, Mr. Ringo?

A. The personal transactions, outside of the business. He had the Army and Navy Store and there were also a lot of investments and items of that nature which would not appear on the books and records.

Q. That is why I asked you to explain, Mr. Ringo.

A. Which would be common, I think, in most individuals.

Q. Did you audit the books and records of the Army-Navy Store? A. I did not.

Q. Why did you not?

(Testimony of Charles R. Ringo.)

A. Because I wasn't engaged to do that.

Q. Would it not be necessary to audit the books and records of the Army & Navy Store in order to determine the net worth of the taxpayer?

A. Not necessarily audit them. The books and records of the Army-Navy Store seemed to be in pretty good condition and it would not necessarily be unless the taxpayer engaged you to do that, because there you have—even there in your daily receipts there would be cash receipts. I don't know how—or not charged sales,—how you—where there wouldn't be sales tickets or something, how you could verify [69] the sales, for instance.

Q. Did you ask Mr. Olender if the books and records of the Army & Navy Store were complete?

A. I think I did, yes.

Q. And what did he say?

A. The Army-Navy Store, as far as I—as far as we could determine, seemed to be in pretty good condition.

Q. Did you determine, Mr. Ringo, during the course of your study of Mr. Olender's affairs that all of the purchases and sales in connection with the Army-Navy Store were not on the books and records of that store?

Mr. Hagerty: Objected to as being leading and suggestive, your Honor.

The Court: Sustained.

Q. (By Mr. Drewes): Will you state, Mr. Ringo, whether or not you had any conversations with Mr. Olender concerning transactions between

(Testimony of Charles R. Ringo.)

the Army & Navy Store and one George Goodman?

A. Yes.

Q. Where and when did that discussion take place?

A. Oh,——

Q. To the best of your recollection.

A. When the case first came to us, I believe I got together with Mr. Root, to ask him what the Government wanted, and Mr. Root brought out the Army-Navy—the transactions with [70] Goodman & Company—and that was really the start of the entire matter, with the Goodman transaction.

Q. And did you have a discussion with Mr. Olender concerning the Goodman transactions?

A. Oh, plenty of them, yes.

Q. Where did those discussions take place?

A. In my office.

Q. And was anybody else present that you recall?

A. I can't recall anybody else being present, no.

Q. To the best of your recollection will you just state what was said by Mr. Olender and what was said by you with respect to the George Goodman transactions and the Army-Navy Store?

A. Back in 1928—I can't—it's just—just what transactions. We had a list—. These were bought with cashier's checks.

Q. What was bought with cashier's checks?

A. The goods from Goodman.

Mr. Hagerty: I object to this as improper foundation unless the time is fixed.

Mr. Drewes: He testified he had many conversa-

(Testimony of Charles R. Ringo.)

tions in his office following his employment some years ago. No one else present. I believe that is adequate foundation.

The Court: Overruled.

Mr. Drewes: You may answer. [71]

A. Well now, wait a minute, to refresh my memory—what were we trying to say there? We had—in fact, I think Mr. Root gave me a list of the cashier's checks at the time that we—that were used to purchase these goods from Goodman, and we went into the Goodman transactions necessarily on this.

Q. (By Mr. Drewes): What did you ask Mr. Olender about the Goodman transactions and what did he reply?

A. Well, I asked him if he bought these goods from Goodman and what was done with the goods, and they—we never were really able to get the whole story on it. The Goodman transactions weren't entered into the books, as far as we could find.

Q. Did Mr. Olender tell you that, is that your testimony?

A. Finally we found that they were not, yes, and neither were the disposition of them—of the goods.

Q. You determined that the Goodman transactions were not on the books of the Army-Navy Store, is that correct?

A. That's right, the original transaction.

Q. Is it not true that as a result of that deter-

(Testimony of Charles R. Ringo.)

mination that you adopted the net worth approach to analyzing Mr. Olender's affairs?

Mr. Hagerty: Objected to again as leading and suggestive.

The Court: Overruled.

A. Well, we used the net worth approach because I was asked to give a net worth statement by the revenue agent. [72]

Mr. Drewes: I ask——

A. That is what the revenue agent asked for.

Mr. Drewes: ——that be stricken as not responsive.

Mr. Hagerty: I think it is responsive.

The Court: Motion denied. It may stand on the record.

A. At the time they came in, the agent asked for a net worth statement, net worth statements on this matter.

Q. (By Mr. Drewes): You determined, Mr. Ringo, that the books and records of the Army-Navy Store were not complete, did you not?

A. As far as the Goodman transaction, it never went through the books of the Army-Navy Store—either the acquisition or the disposition of it.

Q. Is it not true that an audit of those books would therefore have been unproductive?

Mr. Hagerty: Objected to as being leading and suggestive again and calling for the opinion and conclusion of this witness.

The Court: Overruled.

A. The Goodman—well, in the first place how—

(Testimony of Charles R. Ringo.)

put the question to me again and I will try to answer it for you.

Q. (By Mr. Drewes): You knew that the books and records of the Army-Navy Store did not include all of the transactions?

A. I knew that the Goodman deal was not in there. [73]

Q. And therefore you knew that an audit of those books would have been useless?

A. Well, I was never asked to audit the books in the first place.

Mr. Hagerty: Objected to as leading and suggestive.

The Court: Overruled.

A. I was never asked to audit the books, in the first place, and, of course, they would not reflect the Goodman deal, that's correct.

Q. (By Mr. Drewes): They would not reflect the Goodman deal? A. That's correct.

Q. And therefore the net worth study was the only approach to determining the income of the defendant for the years in question, isn't that correct? A. Well, I imagine it would be, yes.

Mr. Drewes: I wonder if we might take the recess at this time.

The Court: Yes. We will take the noon recess, ladies and gentlemen of the Jury, and we will resume this afternoon at 2:15—fifteen minutes past two. The same admonition to you.

(Whereupon an adjournment was taken until 2:15 o'clock p.m. this date.) [74]

Tuesday, September 16, 1952—2:15 o'Clock P.M.

CHARLES R. RINGO

called as a witness on behalf of the Government,
resumed the stand, previously sworn:

Direct Examination
(Continued)

By Mr. Drewes:

Q. Mr. Ringo, you testified this morning that you were employed by the defendant to construct or reconstruct his earnings for the years 1942 through 1947. I will hand you a document which is entitled "Milton H. Olender, comparative net worth statement of December 31, 1947, and December 31, 1941," and it is also marked in the upper righthand corner "Exhibit No. 1" and I will ask you if you can identify that document?

A. I can.

Q. What is it, Mr. Ringo?

A. It is my attempt to work out the net worth of Mr. Olender at a beginning and an ending period, and I think you will find further in there where I have tried to reconcile that to his income tax returns as to his income, and tie them together.

Q. The document marked Exhibit 1, which is in front of you, is the summation of your work in this connection?

A. It is the summation of the net worth at the beginning and end of those two periods as best I could determine. [75]

Q. Now, I show you similar documents bearing

(Testimony of Charles R. Ringo.)

in the upper right-hand corner Exhibit 2, Exhibit 3, pages 1 and 2, Exhibit 4, Exhibit 5, Exhibit 6, Exhibit 7 and Exhibit 7-Schedule A, and I will ask you if you can identify those particular documents. Will you please look at each one, Mr. Ringo?

A. Yes.

Q. Can you identify the documents which I handed you last, Exhibits 2 through 7, inclusive?

A. I can.

Q. What are they, Mr. Ringo?

A. They are the details of what appears in Exhibit 1 and the last exhibit—or let's see, Exhibit 7, is the accounting for the increase in net worth.

Q. From what source or sources did you get the information which is contained in these documents which I have just identified, Mr. Ringo?

A. I first asked Mr. Olender to give me estimated statements of his net worth at various dates. Then I went through his safe deposit box to find out what was in the safe deposit box, and then I tried to trace back how he acquired these various assets he had and through discussion with Mr. Olender and asking questions, so if there were things not included in the safe deposit box that should be included, I tried to get the information from which I could work up these net worth statements. [76]

Q. To what extent, Mr. Ringo, did you verify the information that was given to you by Mr. Olender in your preparing of these documents?

A. Well, I saw the items in his safe deposit box and asked him for means of how he acquired them. I saw canceled checks for various items. I did get

(Testimony of Charles R. Ringo.)

his bank statements which were incomplete, and a period I couldn't get. I got transcripts from the bank, picked out the larger items of expenditures on there to see if they would account for more assets and asked him to get me further information so as to work it out.

Q. For example, on Exhibit 7, certain figures are given for living expenses for years shown. From what source did that information come?

A. Purely from what Mr. Olender told me. There was no way of me knowing just what he spent for living because I don't know just what he did spend for living. They are purely figures that were given to me by Mr. Olender.

Mr. Drewes: At this time, your Honor, the Government will offer the document marked Exhibit 1, Milton Olender Comparative Net Worth as of the Last Day of 1947-48, into evidence.

The Court: It may be marked in evidence.

The Clerk: United States Exhibit No. 24 in evidence.

(Thereupon the document above referred to was received [77] in evidence and marked United States Exhibit No. 24.)

Mr. Drewes: And if your Honor please, as to Exhibits 2 and 3, 3 page 1 and 3 page 2, 4, 5, 6, 7 and 7-A, they are clipped together. We would ask that they be marked for identification.

The Court: So ordered.

The Clerk: United States collective Exhibits No. 25 for identification only.

(Testimony of Charles R. Ringo.)

(Thereupon the documents above referred to were received and marked United States Exhibit No. 25 for identification.)

Q. (By Mr. Drewes): I hand you Government's Exhibit No. 24, Mr. Ringo, and I call your attention to an item included under assets as of December 31, 1947, entitled "Single premium life insurance policy \$15,833.46," and ask you if you had a conversation with the defendant concerning that particular item on Exhibit 24?

A. He brought in the data to me——

Q. Just answer the question. A. Yes.

Q. Where did that conversation take place?

A. In my office.

Q. Do you remember approximately when?

A. Well, it is kind of hard to tell just what date these things took place because these took place all during a period when we were working on this net worth. [78]

Q. During the period when you were making this study? A. That is right.

Q. Was anybody else present at that time?

A. Not on that particular item.

Q. Will you please relate to the ladies and gentlemen of the jury what was said by Mr. Olender and what was said by you, considering that particular item, single premium life insurance policy?

A. Well, let's see, you mean how he brought it in to me?

Q. If you had a conversation concerning that

(Testimony of Charles R. Ringo.)

item, to the best of your recollection will you simply state what was said by Mr. Olender and by you?

A. Mr. Olender brought this data in to me just after I worked up the preliminary net worth and he brought this item to me and told me that he had something that he had forgotten to include.

Q. What did you say?

A. Well, I said at the time it would throw his net worth out of balance.

Q. What did he reply?

A. Well, he did ask me if—because the Asturias stock was worthless, if I would leave that out because he didn't want to involve his mother in connection with certain gifts she had made to him. His mother was getting old and he didn't want her to have to explain. [79]

Q. Do I understand it is your testimony that the defendant asked you to leave the Asturias stock out of the net worth compilation?

A. On the grounds that the stock wasn't worth anything anyway, and he didn't want to have to explain gifts from his mother because he didn't want to involve her, she was getting old.

Q. That request, as I understand your testimony, was made to you after you called the defendant's attention to the fact that the \$15,000 single premium life insurance policy had been left off the net worth statement and therefore it would be out of balance to that extent?

A. That is correct.

Q. What happened then, if anything? Did you

(Testimony of Charles R. Ringo.)

have further discussion with Mr. Olender, or with anyone else in his presence concerning that particular item?

A. Well, I went to Monroe Friedman with it and he insisted it would have to go in, he would have to get the explanation.

Q. I would appreciate if you would elaborate on that. Who was Mr. Friedman?

A. Mr. Friedman was an attorney we brought into the case on the matter.

Q. Representing the defendant?

A. That is correct.

Q. And you discussed this item of the single premium life [80] insurance policy with Mr. Friedman in the presence of Mr. Olender?

A. That is correct.

Q. Will you please, then, to the best of your recollection, state what was said by the persons present?

A. We told him nothing could be left out and we would have to get the gifts from his mother.

Q. Who told the defendant nothing could be left out?

A. Both of us.

Q. You just mentioned the Asturias stock, Mr. Ringo. In the course of your work for the defendant you obtained from him a list of the securities owned by him, did you not, as of several different dates?

A. I believe that was not in his safe deposit box, but we did get that from canceled checks. I asked him to produce canceled checks he told me about at

(Testimony of Charles R. Ringo.)

the time of a check for \$5,000. I have forgotten who the check was made to.

Q. Was the defendant's ownership of Asturias stock included in your net worth statement?

A. That is correct.

Q. As shown in the defendant's Exhibit No. 24?

A. I show on Exhibit 3, page 1, item 12, 500 Asturias Corporation stock.

Q. What is the value of that stock as shown in the net worth statement? [81] A. \$5,000.

Q. Did the defendant Olender at any time during the course of your work for him tell you that he had purchased an additional \$5,000 worth of Asturias stock? A. No.

Q. Did he at any time during the period of your study tell you that he had paid \$5,000 to the Asturias Corporation for any purpose?

A. I only have this——

Mr. Hagerty: Object to the question as leading and suggestive.

The Court: It probably is. Sustained.

Q. (By Mr. Drewes): Is the item to which you have just referred \$5,000 as common stock in the Asturias Export Corporation the only investment or contribution mentioned to you by Mr. Olender during the course of your studies?

A. It was the only one on Asturias, yes. The explanation of that will be found on Exhibit 3——

Q. Never mind explanations, Mr. Ringo. Just answer my question. A. All right.

Q. Mr. Ringo, I will show you a photostatic copy

(Testimony of Charles R. Ringo.)

of a document bearing the title "M. Olender, comparative balance sheets, 1941-1946" and ask you if you can identify that?

A. As I stated, when I first started in, when I first [82] started in with the case I wanted to make up net worth statements, I asked Mr. Olender to bring me estimates of the assets and liabilities he had at the end of each year, and he brought them to me, and from that he gave me a starting point in trying to work up his net worth statement.

Q. I understand, Mr. Ringo. What is that document that is before you?

A. This is a summary of the items he brought to me, the various statements he brought to me of his net worth.

Q. Is that in your handwriting?

A. That is in my handwriting.

Q. Where is the original?

A. Mr. Olender took them back.

Q. Mr. Olender took them back?

A. That is right.

Q. And the information which appears on this document you got from Mr. Olender?

A. That is right.

Mr. Drewes: At this time, your Honor, we will offer this photostatic copy of the identified documents into evidence.

Q. (By Mr. Drewes): The original was returned to the defendant or his representatives?

A. That is right.

The Court: It may be marked. [83]

(Testimony of Charles R. Ringo.)

The Clerk: United States Exhibit No. 26 in evidence.

(Thereupon the photostatic copy of document above referred to was received in evidence and marked United States Exhibit No. 26.)

Mr. Drewes: Ladies and gentlemen of the jury, the information which appears on this photostatic copy is, for the most part, substantially identical with the information which is in the stipulations. However——

Mr. Hagerty: If your Honor please, I will object to this, the document speaks for itself.

The Court: Yes, sustained.

Mr. Drewes: However, I should like to read this part of it to the jury, if I may, because the first item is an item not in the stipulation. It is entitled, "Cash in vault" and although I did not limit it, I will at this time——

Mr. Hagerty: If your Honor please, I will object to the explanation. The exhibit is in evidence and speaks for itself.

Mr. Drewes: Then I won't limit it. The first year is 1941. Shall I read the years '41, '42 and '43 and '44? I was about to limit the years which were pertinent. I was simply stating I was starting with the year 1944, although this document goes down to 1941.

Mr. Hagerty: Oh, I see. I want to cooperate in every respect, but I thought we had something else extraneous. [84]

(Testimony of Charles R. Ringo.)

Mr. Drewes: The first item here is "Cash in vault" and as of the 31st of December, 1944, the figure shown is \$50,000. For the 31st of December, 1945, the figure is \$7200, and for the 31st of December, 1946, nothing.

Q. (By Mr. Drewes): Mr. Ringo, did you prepare the tax returns of Mr. Olender or Mrs. Betty Olender for the years 1945 and 1946 which are in evidence? A. No, I did not.

Q. Did you prepare any tax returns?

A. I prepared them from 1947 on.

Q. '47 on? A. That is right.

Q. Do you recall whether you prepared the taxpayer's 1947 return before or after you began the work for him to which you have testified in connection with these comparative net worth statements?

A. Necessarily the tax returns were due right during the rush season and we postponed any preparation of net worth until the rush season was over.

Q. Your answer is that you prepared the 1947 return before you began undertaking the work which you have testified?

A. That is correct. [85]

Q. In response to an earlier question you testified that you examined the contents of the taxpayer's safe deposit vault? A. That's correct.

Q. Where was that vault, Mr. Ringo, do you recall? A. I have my contents right here.

Q. Where was the safe deposit vault?

A. It was at the Bank of America, 12th and Broadway in Oakland.

(Testimony of Charles R. Ringo.)

Q. In Oakland? A. That's right.

Q. Do you recall approximately when you examined the contents of that vault?

A. On Wednesday, May 5, 1948, about 10 a.m.

Mr. Drewes: No further questions at this time.

Cross-Examination

By Mr. Hagerty:

Q. Mr. Ringo, you prepared this comparative net worth statement for Mr. Olender by questioning him orally about his affairs, is that not true?

A. That is correct.

Q. You made no audit of his affairs, did you?

A. No.

Q. No audit of his books?

A. That's right.

Q. And you did not attempt to fit this comparative net worth [86] or analysis of his accounts and affairs into any particular year, did you?

A. No, that's right. As I say, I started out with that idea, but I didn't finally do it, no.

Q. Now you made an inventory on May 5, 1948—— A. That's right.

Q. ——of the contents of this safe deposit box?

A. That's right.

Q. And you prepared a memorandum right there in the safe deposit vault as you were going through these things, did you not? A. That is right.

Q. And on that memorandum you indicated that there were about \$20,000 in these two and a quar-

(Testimony of Charles R. Ringo.)

ter per cent Treasury Bonds that were being held in the box for Mr. Olender's mother, isn't that true?

Mr. Drewes: If your Honor please, may I object to the improper cross-examination. I don't recall any testimony in chief on the subject of bonds or on the subject of the contents of the box.

Mr. Hagerty: On direct examination it was gone into as to the inventory in the examination of the safe deposit box and its contents.

Mr. Drewes: I asked him what the date was.

The Court: The objection is overruled. You may answer [87] that.

A. I have it right here on the contents of the safe deposit box. "Bonds being held for mother, two and a quarter per cent Treasury Bonds," and listed \$20,000 worth.

Q. (By Mr. Hagerty): And when you were making this inventory of the box were you there alone or were you there with Mr. Olender?

A. I was with Mr. Olender.

Q. You spoke this morning on direct examination about the Goodman transaction. Mr. Olender explained that to you, did he not?

A. He explained—I will say this, I didn't go into any further on the final disposition. I understood he was taking that up with Mr. Friedman as to how he disposed of the bonds——

Q. He explained to you that he——

A. I mean disposed of the stock. I will correct that.

(Testimony of Charles R. Ringo.)

Q. He explained to you, did he not, that he made a purchase of about \$20,000 worth of stock from a man by the name of Goodman; the goods were delivered to him and that they were not proper for his store and that he then was able to dispose of most of them at cost, about 75 per cent of them at cost, in various transactions, and that he made no profit or loss on the deal, and he did not, as a result, put them into the books of the Army & Navy Store? [88]

A. That was explained to me later, that there was no profit on the transaction. He told me that; that is why they were not on the books.

Q. You have been an accountant for many years, Mr. Ringo? A. That's correct.

Q. And in your experience in auditing businesses have you not found that it is a frequent practice of business men that when wash sales occur or large transactions that are not either profitable or in which no loss is sustained, they are not shown in the books of the business because they distort the outlook of the business from an accounting standpoint, is that not true?

A. Of course that would be a matter of the particular firm, how they do it. Of course I think there ought to be some record of it made.

Q. Well, in this instance there was no record on the books but the records of the cashier's checks that you found in the vault, is that not right?

A. No, I got that, I think, from Mr. Root, at the time he brought me the data and I talked it over

(Testimony of Charles R. Ringo.)

with Olender on the cashier's checks. I have a memo somewhere. I am trying to find it, as to how this came up.

Q. Well, in the interests of time, Mr. Ringo, would you say it is fair to state that the Goodman transaction in which neither a profit nor a loss was sustained, the failure to [89] report or show it or record it in the books of the Army & Navy Store in no way tended to make those books less accurate?

Mr. Drewes: I object to that, your Honor. I don't know whether counsel is making a statement or asking a question. It seems it is opinion testimony that he is trying to elicit, or is it a statement as to what the books reflected of this particular firm?

The Court: It may be answered. This man is an expert. He can give us an opinion. You may answer the question.

A. I will say that ordinarily the test of inventories and whether transactions are recorded is not a gross profit test. In other words, the gross profits should be fairly consistent. Now if you had a tremendous transaction of purchases and if they were disposed of at cost, your gross profit would probably be thrown way out because ordinarily gross profits are the difference between what you pay for goods and what you sell them for, and if there was a big disproportion in the amount of purchases, and they were recorded as purchases, and then you had shown them as sales at the same price, your gross profit would be very much distorted. I will say that.

Q. (By Mr. Hagerty): Now the failure to

(Testimony of Charles R. Ringo.)

record or report this Goodman transaction in the books of the Army-Navy Store, that failure was not the reason why you made up a comparative net worth statement, was it?

A. No. I made up a comparative net worth statement because [90] the Government asked for it.

Q. In making up that net worth statement from the information received from Mr. Olender, did he not—that is, at that time he didn't tell you about the Asturias stock, did he?

A. You mean about additional Asturias stock?

Q. Yes.

A. No, he didn't tell me about any additional Asturias stock.

Q. And later, after you discussed it with the agents and they asked you about that item, and then you went back to discuss it with Mr. Olender, did he not tell you that in his mind there was no point of putting in a net worth statement any worthless stock?

A. In fact, at the time he asked me to leave it out he did say the stock is worthless anyway and it wouldn't—shouldn't be in net worth.

Q. He told you he lost all the money he put in it, isn't that correct? A. That is correct.

Q. And that the company was hopelessly insolvent?

A. That's right. But I explained to him at the time that this was not net worth from the standpoint of what is the thing worth but what it costs.

Q. On that point, Mr. Ringo, you have been a

(Testimony of Charles R. Ringo.)

certified public accountant for many years, is that right? [91] A. That's correct.

Q. And you have had broad experience in the field of accounting? A. That's right.

Q. And prior to that you were an agent with the Internal Revenue? A. That's right.

Q. And in addition to that you are an attorney?

A. That's correct.

Q. And you are licensed as an attorney to practice before the Tax Court, is that true?

A. That's correct.

Q. And judging from Mr. Olender's comment to you that he didn't think this worthless stock should have been put in the net worth statement, what would you, as an expert accountant, think of his ability as an accountant?

A. Well, now, from the standpoint of the type of net worth statement we were making up here, to account for funds, that would not show any—would not be proper. Of course, if you were showing—your balance sheets anyway do not necessarily reflect values. Balance sheets are historical. And if—unless this had been—there had been some reason to write it off the books, it would reflect in the analysis of the capital account—at least either have to reflect in the analysis of the capital account or it would have to reflect as an asset. [92] In other words, have to be claimed as a loss at the same time on the other. And as this is an interim period, it would either have to show as an asset or it would come out in the Exhibit 7 where I am showing the

(Testimony of Charles R. Ringo.)

analysis of the accounting for his income. So it would not reflect the—a person who would really understand accounting, they would say it really should go in there.

Q. Well Mr. Olender failed to tell you at the same time about a bank account of his wife, isn't that true? A. That is true.

Q. And subsequently in conversation with the agents, Mr. Root and Mr. Whiteside, they asked you in the comparative net worth statement where that account was shown, is that right?

A. They told me that it was not included.

Q. So that you went back to Mr. Olender again and in conversation discussed the matter with him, right? A. That is correct.

Q. And again he told you in his idea of a net worth statement he did not have to include his wife's furs or his wife's personal bank account, is that right? A. That is right.

Q. Again I ask the question, from the standpoint of your experience as an accountant, would you, in your association and experience with Mr. Olender, what do you think of his [93] knowledge of accountancy?

A. Of course, we are getting into something here where it would depend on what kind of a net worth statement you had.

Q. Let me withdraw the question.

A. Of course here we are involved—

Q. Let me withdraw the question, Mr. Ringo, and put it this way. The statement has been made in

(Testimony of Charles R. Ringo.)

this Court, and evidence will be offered apparently that Mr. Olender, the defendant here, is an expert in the field of accountancy. Now you have had close association with him. You are acknowledged an expert. Would you call him an expert?

Mr. Drewes: I will object to that, your Honor, as calling for the opinion and conclusion of the witness on an area in which he is not an expert. His opinion as to another man's ability is not material, relevant evidence.

Mr. Hagerty: If your Honor please, I think that it is. This man is definitely acknowledged as an expert. He is put forward as an expert by the Government. He is the Government's witness and he has had an opportunity through association and dealings and an examination of the defendant to form an opinion as to the defendant's capacity as an accountant, and it is part of the Government's charge here that the Defendant is a good accountant, and I think that this man should be permitted to give his opinion on that subject.

Mr. Drewes: I think he is qualified, your Honor, to [94] testify as to the merits or the shortcomings of the defendant's books.

The Court: As I recall the opening statement made by the Government, he stated that the defendant was at all times conversant with the items concerning his business and so forth. The contention was never made that the defendant had any expert capacity.

Mr. Drewes: I stated in my opening remarks

(Testimony of Charles R. Ringo.)

that he had himself prepared many returns and had control over his own business and had taken a course in accountancy at the University of California.

Mr. Hagerty: His education was brought in as an accountant, that he was a graduate of the University of California and had training in accountancy.

Mr. Drewes: I feel, your Honor, I should state my position just once more, and in a slightly different way. This man is obviously qualified to testify, on the basis of his training and experience, as to such matters as the condition of the defendant's books, whether they reflect the true income of the defendant and otherwise and matters of that kind. But to ask for the opinion of one accountant as to the competency or ability of another——

The Court: I will sustain the objection.

Mr. Drewes: ——is opinion testimony?

The Court: I will sustain the objection. [95]

Q. (By Mr. Hagerty): Well then, Mr. Ringo, in your conversation with the defendant, Mr. Olander, after you took up these two problems with him, that is, as to why he had omitted the item of the Asturias stock and as to why he had omitted the item of his wife's bank account and her furs, didn't he tell you that in his idea as an accountant for whatever net worth statements were supposed to be made it didn't belong there, he didn't think it should go there?

A. He made that remark to me, yes.

Q. Now, Mr. Ringo, you stated before that you

(Testimony of Charles R. Ringo.)

prepared this net worth statement by questioning him as to his assets, didn't you?

A. That is correct.

Q. You questioned him as to his bank accounts?

A. That's right.

Q. And he gave you the names and locations of his accounts, two or three of them, isn't that true?

A. Well, that's right.

Q. And they are in the same bank as his wife's bank account, isn't that true?

A. I don't know where his wife's bank account was. I haven't—

Q. Oh, you didn't find out when you finally discussed it with him?

A. No. Remember this all came up after—this is after [96] I was finished with this net worth statement. So I didn't—

Q. Now on direct examination Mr. Drewes was asking you in reference to this Asturias transaction, where you had it indicated in that net worth statement, and he said: Is that the only item in reference to an Asturias investment that Mr. Olender had told you about? A. Yes.

Q. You answered yes. And then you started to explain that by going to the statement, and Mr. Drewes stopped you. Will you now carry on that explanation?

The Court: We may take a short recess. Same admonition to you, ladies and gentlemen of the Jury.

(Short recess taken.) [97]

(Testimony of Charles R. Ringo.)

Q. Mr. Ringo, just before the recess you were about to answer and make the explanation that Mr. Drewes had stopped you on in reference to the Asturias stock item. Will you proceed, please?

A. On Exhibit 7—no, it is not Exhibit 7—on Exhibit 3, page 2, item 12, it shows personal check to Asturias Import and Export Company December 12, 1946, \$5,000. I want to say that when Mr. Olender presented me with that check that is how I became cognizant of the fact that he had stock in—that he had at least given money to Asturias Import and Export, and on questioning him he told me about this stock.

Q. Did he tell you about any of the quarrels or anything he had had with the management because of the loss of these funds that he had advanced to him?

A. I don't remember him talking about it.

Mr. Drewes: Objected to as improper cross-examination.

The Court: The answer came in. The objection is overruled.

Q. (By Mr. Hagerty): Now actually, Mr. Ringo, you know that Mr. Olender didn't keep his own books, did he?

A. I believe he had a girl keeping the books, and I believe they were not in his handwriting. As I remember, they were not.

Q. And you know of your own examination and your own knowledge that Mr. Olender's parents had

(Testimony of Charles R. Ringo.)

been quite wealthy [98] and he had inherited a lot of money, is that true?

A. That is what Mr. Olender told me.

Mr. Drewes: Your Honor, may I object to this line of questioning. This is improper cross-examination, it is purely matters of defense to be brought into the case at the proper time. There was nothing whatever said about the parents of this man on direct examination.

Mr. Hagerty: It has to do with examinations made by the witness on defendant's affairs.

Mr. Drewes: You will have to call him as your own witness at the proper time.

Mr. Hagerty: It is preliminary to this question I am about to ask.

The Court: All right, I will allow it if it is preliminary.

Q. (By Mr. Hagerty): The books of the Army and Navy store did not reveal any of the personal investments and other affairs of the defendant, is that true? A. That is true.

Q. And as a man experienced in good accountancy you yourself wouldn't expect to find in those books the personal investments of this defendant, would you?

A. Very seldom will you find anybody including their personal investments in their business books.

Q. This comparative net worth study that you prepared was [99] purely intended as a starting point for the work you were going to do for Mr. Olender, isn't that right?

(Testimony of Charles R. Ringo.)

A. Which are you referring to now? You mean the one by years?

Q. The prepared comparative net worth statements that you made up for him.

A. You mean the one that was finally submitted?

Q. Yes.

A. I want to know what you are referring to, whether you mean that other exhibit or this one (indicating).

Q. Let's start with Exhibit No. 26, this one. You have seen the photostatic copy?

A. That is right.

Q. That wasn't intended to be a full and final and complete study, was it?

A. Not by any means, no.

Q. And you, as a matter of fact, didn't audit any of the items that were involved there. You obtained all this information by word of mouth from Mr. Olender?

A. I used that as a starting point.

Q. This was purely a starting point for the other study you prepared, is that true?

A. That is correct.

Q. And if you had tried to break this down into a period of years it would have shown that the defendant had over-reported [100] income as well as under-reported income, isn't that true?

A. That is true.

Mr. Drewes: May I object to that question. Please don't answer. Apparently that question would call for an answer for work that wasn't done.

(Testimony of Charles R. Ringo.)

The Court: That is true, objection sustained.

Mr. Hagerty: No further questions.

Redirect Examination

By Mr. Drewes:

Q. Mr. Ringo, early in the cross-examination Mr. Hagerty asked you a question concerning some bonds which were in there—in Mr. Olender's box?

A. That is correct.

Q. And you testified something about his mother in connection with those bonds, and I didn't quite hear it. What was your testimony on that question?

A. I say here is the list of the bonds of what was in the safe deposit box, and on the second page I have down here bonds being held for mother, and they are two and a quarter per cent treasury bonds, and there is a total of \$20,000 worth.

Q. Would you point out to me the entry?

A. Right there (indicating).

Q. And does that refer to this series above or below? A. The series below.

Q. Oh, I see. And this was the list that you made at the [101] time you inventoried the box?

A. That is right, here is the first page made at the time I inventoried the box.

Q. And that was on May 5th of 1948 you testified? A. That is right.

Q. And from what source did you get that information?

(Testimony of Charles R. Ringo.)

A. We are going back to 1948. Some of this is a little hazy in my memory, but I am pretty sure the bonds were marked that way, there was something in that group of bonds that identified it as mother's bonds.

Q. Was Mr. Olender with you at the time that you made that inventory? A. Oh, yes.

Q. In fact, you so testified?

A. That is right.

Q. Did he tell you that those bonds belonged to his mother?

A. He told me they did, and I believe it was also identified in the box there that they were his mother's.

Mr. Hagerty: I object to this as being cross-examination of his own witness.

The Court: Overruled.

Q. (By Mr. Drewes): Mr. Ringo, you testified on direct examination that you had not prepared the 1945 and 1946 returns for Mr. Olender and his wife, but that you had prepared the returns from 1947 on, is that correct? [102] A. That is correct.

Q. I will show you a yellow paper, it is an accounting paper, containing a number of figures in pen. It is entitled the title at the top, "M. Olender share" and then a word that I don't understand, and the word "expense," and ask you if you can identify that?

A. These are the figures that Mr. Olender gave me in order to prepare his 1947 income tax return.

Q. And is that in his handwriting?

(Testimony of Charles R. Ringo.)

A. That is in his handwriting except you will see where it says "interest" I have inserted in my own handwriting "U. S. Government bonds \$1225."

Q. I show you another document consisting of two pages, plain white paper, it is much the same as the one that you have just identified except that it has been typewritten and it says at the top "Income taxes, depreciation, Olender, Hamilton, Kaplan, Fresno partnership" and a great deal more and ask you if you can identify that?

A. That is the data that Mr. Olender gave me for preparation of his 1948 income tax return.

Q. Did he furnish that to you himself?

A. He furnished it to me.

Mr. Hagerty: If your Honor please, I am going to object to the statements that have been made in reference to these two sheets and ask that the statements be stricken from the [103] record on the grounds that the sheets are incompetent, irrelevant and immaterial because they are outside the scope of this indictment. They refer to the years of 1947 and '48.

Mr. Drewes: May they be marked for identification and then I will make my offer.

The Court: Yes, mark them for identification.

The Clerk: United States Exhibits 27 and 28 for identification only.

(Thereupon the documents above referred to were received and marked United States Exhibits Nos. 27 and 28, respectively, for identification only.)

(Testimony of Charles R. Ringo.)

Mr. Drewes: If your Honor please, these documents will be offered for the purpose of showing that——

Mr. Hagerty: If your Honor please, if it is an offer of proof I would prefer that it be made out of the presence of the jury.

The Court: All right, could you make it shortly before the recess? Could you do that conveniently?

Mr. Drewes: I have a few more questions of this witness and then I will reserve this.

Q. (By Mr. Drewes): Mr. Hagerty asked you a question which I take it was directed to you as an expert accountant, Mr. Ringo. He asked you if it were not common practice for business firms to leave purchases and sales off of their books when the transaction was unprofitable, and it is my [104] recollection that you answered that question by saying that if such a transaction were put on the books it would result in a distortion of the gross profit picture. Was that your testimony, Mr. Ringo?

Mr. Hagerty: I will object to the question as a misstatement of the evidence, misstatement of my question.

Mr. Drewes: That was your question, to the best of my recollection. It was a very long question and was not answered directly by this witness.

Mr. Hagerty: I used the statement of transactions where neither a profit nor loss resulted, a "wash sale" as it is known.

The Court: Let us take your terminology then,

(Testimony of Charles R. Ringo.)

and adopt it for the purposes of the question presented by counsel. What is your answer then?

Mr. Drewes: Very well.

A. I have already said that it probably should be reported on the books some place, but because of the gross profit test if you show them as direct sales and purchases that the gross profit would be distorted, if there was no profit nor loss on the item.

Q. (By Mr. Drewes): I understood that that was your answer? A. That is right.

Q. As an accountant can you state that it is common practice to leave sales and purchases off of books when there has been [105] neither a profit or a loss?

A. No, it is not, common practice. Probably you might show it in order not to distort it—you might show it as a separate transaction, as a “wash transaction” on the books.

Q. And as a certified public accountant would you advise any client to leave it off the books?

A. No.

Q. And did the books of the defendant here show the Goodman transaction in any fashion, by footnote or any other way? A. No way at all.

Mr. Hagerty: Objected to as leading and suggestive, and an attempt to cross-examine his own witness.

The Court: Overruled.

A. No, there weren't. I testified before that they weren't on the books.

(Testimony of Charles R. Ringo.)

Mr. Drewes: Would your Honor indulge me for just a moment?

The Court: Yes.

Q. (By Mr. Drewes): Mr. Ringo, you testified in response to a question, I believe by Mr. Hagerty, that the books of the Army-Navy store were kept by a girl?

A. That was my understanding.

Q. Do you recall her name?

A. No, I don't know the name. I was merely told that by Mr. Olender. I didn't see the girl. [106]

Q. Isn't it true, Mr. Ringo, that the books were kept by the girl under the supervision of Mr. Olender?

A. I don't know, I suppose they were.

Mr. Hagerty: I object to that. It is an attempt to cross-examine this witness, not proper direct examination, leading and suggestive.

The Court: Overruled, you may answer.

The Witness: I don't know positively, but he is the manager of the store. I don't know, probably he would manage the girl. I imagine he would. I don't know that of my own knowledge.

The Court: That answer may go out.

Q. (By Mr. Drewes): Is it true, Mr. Ringo, that Mr. Olender—strike that.

State if you know, Mr. Ringo, that Mr. Olender himself made daily entries of cash in the cash book?

A. I don't remember whether he did or not right now. [107]

Q. Mr. Ringo, I believe you testified on direct examination that Mr. Olender had reported to you

(Testimony of Charles R. Ringo.)

only \$5,000 investment in the Asturias Corporation; is that correct?

A. Which I explained I got from that cancelled check.

Q. But by your answers to the questions asked of you by Mr. Hagerty you don't in any way mean to change that testimony? A. That's correct.

Q. I might return just a moment to the Goodman transaction. Mr. Olender did not enter on his books the purchases of that merchandise from Mr. Goodman, did he?

Mr. Hagerty: Objected to as already having been asked and answered, your Honor.

The Court: Yes, it has.

Q. (By Mr. Drewes): Let me ask, Mr. Ringo, this question, then: As an expert accountant how could a business man, such as Mr. Olender, one engaged—a merchant engaged in buying and selling, tell at the time of a purchase whether or not the resale of the merchandise would be profitable and so determine whether or not to pick up the purchases on his books?

Mr. Hagerty: I will object to that question, your Honor, as calling for speculation of the witness; it is leading and suggestive of his own witness, and the subject in main has already been covered on direct examination and [108] cross-examination.

The Court: Sustained.

Q. (By Mr. Drewes): When did you last receive a fee from the defendant?

(Testimony of Charles R. Ringo.)

A. I couldn't tell you positively because I don't handle that angle of it.

Q. What is it to the best of your recollection or when did you last hear that a fee was received by the Sargent Company from Mr. Olender?

Mr. Hagerty: I will object to that, your Honor, as being incompetent, irrelevant, immaterial and not within the issues of this case.

Mr. Drewes: I believe it bears on the weight of the evidence, your Honor.

The Court: Overruled.

Mr. Hagerty: If your Honor please, I ask then that the question be limited to the period of time under review in this indictment.

The Court: All right. I think that was the import of the question. Do you have the question in mind?

A. I personally don't know because I don't handle that matter.

Mr. Drewes: That is all.

I will make my offer——

The Court: I will hear counsel on this matter of the [109] offer. It is close to the adjournment hour. I recess the jury and adjourn the case until tomorrow morning at 11 o'clock rather than 10 o'clock. 11 o'clock, ladies and gentlemen, tomorrow morning, and the same admonition to you not to discuss the case or to form an opinion until the matter is submitted to you. You may retire.

I will hear this matter from counsel.

(Testimony of Charles R. Ringo.)

(The following proceedings were had out of the presence of the jury:)

Mr. Drewes: Your Honor, will the Clerk instruct the witnesses to return tomorrow morning? There are two that we expect to testify tomorrow.

The Court: All right, 11 o'clock tomorrow.

Mr. Drewes: If your Honor please, the Government's offer in this matter is very simple. On cross-examination——

The Court: Do you direct my attention to documents before you?

Mr. Drewes: Certainly.

The Court: May I see them?

Mr. Drewes: It will take just a minute. Over my objection Mr. Hagerty elicited testimony to the ownership of \$20,000 in bonds.

The Court: Yes.

Mr. Drewes: In the safe deposit vault. Now in 1947 and 1948 this witness prepared returns for the taxpayer. If your [110] Honor will note, the offer is confined entirely to interest reported on the two years and for no other purposes. The difference in the amount of interest reported in 1947 and 1948 is precisely the amount of interest received on the \$20,000.

The Court: This is a breakdown of the interrelations between it?

Mr. Drewes: This is the information upon which the witness prepared the returns for the defendant, and this figure of interest, here, your Honor, we

(Testimony of Charles R. Ringo.)

will show or expect to show this interest, \$1,225, includes the interest on the bonds which the defendant, I take it, asserts is his mother's. He reported the interest as his own. That is the extent of the purpose for which the document is offered.

Mr. Hagerty: It is outside the scope of the time, your Honor, and that interest or that amount of money could have been given to the defendant by his mother. That doesn't show—as a matter of fact, it could have been a change of ownership, a different period of time.

Mr. Drewes: If they were given, your Honor, the vice of that argument is this: if the bonds were given to the defendant, then, of course—as a gift—it would have to be reported.

Mr. Hagerty: Yes, but we don't have under review 1947 and '48. We have only under review 1945 and '46, and the witness [111] has testified that this memorandum indicating ownership in the mother was apparently the result of his observations when making the inventory of the safe deposit box.

The Court: This memorandum was prepared by the taxpayer?

Mr. Drewes: By the taxpayer in his own handwriting and he reported the interest on the bonds which this witness has testified were shown as belonging to the mother.

Mr. Hagerty: But the memorandum, your Honor, showing ownership in the mother was prepared in the handwriting of this witness on the stand now

(Testimony of Charles R. Ringo.)

in the safe deposit vault. Would you show his Honor that memorandum that you have? It is written down. I have a photostatic copy of it.

The Court: The inference to be drawn from this man's testimony thus far is that the bonds were earmarked.

The Witness: Yes, that is correct; they were earmarked bonds.

Mr. Hagerty: Actually they were in an envelope with the word "Mother" on them, which we will prove later by other sources.

The Witness: This is the whole inventory and when you come over here and you get down to the next page here, the bonds are the mother's, which I got from the data on the bonds. Right here \$20,000—

The Court: And yet in the other instance the memo shows the interest reported by the taxpayer on the bonds in question; [112] is that correct?

Mr. Drewes: That is right.

The Witness: It would appear—

The Court: I think it is a question for the jury ultimately as to the ownership, in the light of all the surrounding circumstances. You may examine the witnesses on the matter. I will allow that to go in.

Mr. Hagerty: May we note an exception, your Honor?

The Court: Yes.

Who reported these bonds being held for the mother?

(Testimony of Charles R. Ringo.)

The Witness: I got that from the bonds.

The Court: How were they identified, by a legend or by a piece of paper wrapped around them?

The Witness: I forget. I think they were in an envelope. I think they were in an envelope.

Mr. Hagerty: Your Honor, would you reserve opinion on that? I believe we can show that on the mother's income tax for 1946 that amount was shown as income and that he subsequently gave the income the following year to her son and then he reported it.

The Court: The position here is—will you hand that other memorandum to me, please?

The Witness: I can show you what they mean here. The 1947 list here shows interest, and I have written in my own handwriting, "U. S. Government bonds, \$1225." I come over [113] to '48, U. S. Government bonds, \$775. The difference would be \$450, and two and a quarter on \$20,000 would be \$450.

The Court: And the interest pertains to the bonds in question?

The Witness: That is my understanding.

The Court: I think the memorandum is admissible, subject to explanation of some form.

Mr. Hagerty: Well, then, your Honor, would you order the Government to produce the mother's income tax return for 1946?

The Court: Yes.

Mr. Shelton: We have that, if your Honor please, and we will produce it.

(Testimony of Charles R. Ringo.)

The Court: Certainly there is some explanation, some rationalization. Of course, I can't anticipate what it may be, but here is a credit—

The Witness: That's right.

The Court: I will allow it.

The Clerk: U. S. Exhibits 27 and 28, heretofore marked for identification, now in evidence.

The Court: We will adjourn, gentlemen, unless there is some other matter.

(Thereupon U. S. Exhibits Nos. 27 and 28 for identification were received in evidence.)

Mr. Drewes: No. [114]

The Court: Tomorrow morning at 11 o'clock. And all witnesses are instructed to return.

Mr. Shelton: If your Honor please, may the record show that we have made this clear and available to defense counsel?

The Court: It may be lodged with the Clerk and subject to the examination of all parties.

(Thereupon an adjournment was taken until 11 o'clock a.m. Wednesday, September 17th, 1952.) [115]

September 17, 1952, at 11:00 A.M.

The Clerk: United States of America vs. Olender on trial.

Mr. Menzer: If the Court please, my name is Herbert W. Menzer. I am an attorney for Mr. Morris W. Lerman, subpoenaed to be here at 11:30

this morning. I have here an affidavit from Dr. Ruschin to the effect that Mr. Lerman was injured yesterday in an automobile accident and will be confined in his home for a period of approximately ten days. May I state to the Court that I have talked with the Doctor this morning and he said that they would take X-rays today and that the period involved or stated in this affidavit may be longer or shorter, depending upon what the X-rays show.

The Court: The application will be filed and the United States Attorney may communicate with the Doctor during the course of the trial as to the progress of this gentleman.

Mr. Drewes: We shall keep in touch with him.

CHARLES R. RINGO

called as a witness on behalf of the Government, resumed the stand; previously sworn.

Redirect Examination (Continued)

By Mr. Drewes:

Q. Mr. Ringo, you have identified Exhibit No. 27 as being data given you by the defendant in his own handwriting pertaining to his 1947 return, and Government's [116] Exhibit No. 28 as being similar data for the year 1948 furnished you by the taxpayer. What is the figure shown for interest in the first exhibit, No. 27?

A. For 1947 the interest shown is \$1225.

(Testimony of Charles R. Ringo.)

Q. And what is a similar figure for the year 1948, Mr. Ringo? A. \$775.

Q. And what is the numerical difference between the two? A. \$450.

Q. State, if you can, what that \$450 represents?

A. It is more surmise than it is fact as far as I know——

Mr. Hagerty: Then, if your Honor please, we will object to it going into the record.

The Court: Well, if it be conjecture or speculation, Mr. Witness, the subject would not be a proper province or your part of the testimony for a jury. If it is based on fact or in the realm of fact you may testify.

Q. (By Mr. Drewes): Do you know, Mr. Ringo, what that difference of \$450 represents?

A. I do not know positively. I think I do.

Q. Is it true, Mr. Ringo, that the sum of \$450 represents one year's interest on two and one-quarter per cent Treasury bonds in the amount of \$20,000?

Mr. Hagerty: Objected to, your Honor, on the grounds that the question has already been asked and answered. He says "I don't know positively," and this is simply another [117] way of leading the man into an admission.

The Court: Do you know?

The Witness: I don't know positively.

The Court: The witness says he doesn't know positively.

Q. (By Mr. Drewes): Did you testify in this

(Testimony of Charles R. Ringo.)

Court last night, Mr. Ringo, it was your understanding that the \$450 represented interest for one year on \$20,000 of bonds paying interest at the rate of 2 and one-quarter per cent?

Mr. Hagerty: Objected to, your Honor, on the ground it is leading and suggestive and an attempt to cross-examine his own witness.

The Court: If he testified last evening I can't recall, but if that be the subject matter of your testimony, was it last evening?

The Witness: I didn't say it just in that way.

The Court: How did you say it?

The Witness: I said that two and a quarter per cent of \$20,000 would be \$450.

Mr. Drewes: If your Honor please, this witness, of course, has been called by the Government, but the record shows that he is employed by the taxpayer as his accountant. I will call the attention of the Court and counsel to the transcript of the proceedings in this court yesterday afternoon out of the presence of the jury. The Court asked the witness to hand him the documents which are in evidence, [118] then the witness at line 23, page 113:

“The Witness: I can show you what they mean here. The 1947 list here shows interest, and I have written in my own handwriting United States Government bonds, \$1225. I come over to 1948, United States Government bonds, \$775. The difference would be \$450, and two and a quarter per cent on \$20,000 would be \$450.

(Testimony of Charles R. Ringo.)

“The Court: And the interest pertains to the bonds in question?”

“The Witness: That is my understanding.”

Q. (By Mr. Drewes): Did you so testify in this court?

A. I said that was my understanding, just what I was trying to say a little while ago.

Q. And now will you state for the jury the basis upon which you arrived at that understanding?

A. Mr. Root was in my office and we compared these amounts and we said that two and a quarter per cent on \$20,000 would be \$450.

Mr. Hagerty: Object to that as being hearsay. It is out of the presence of the defendant.

Q. (By Mr. Drewes): Was the defendant present at that conversation? A. No.

Q. Did you at any time discuss the difference between those two figures with the defendant? [119]

A. I don't remember of ever having discussed it directly with him, no, because that was after the preparation of the statement, of the net worth statements.

Q. When you received from him—

The Court: There was an objection urged by counsel for the defendant, there was no ruling made on it. The Reporter may interpolate my ruling as overruled, the objection imposed by counsel is overruled.

The Witness: Let's see, I forgot what I started to say there. At the time the figures were brought to me—is that what you are asking? Was I just

(Testimony of Charles R. Ringo.)

asked if there were interest—I marked down here interest on U. S. Government bonds. I didn't try to figure out just what bonds they were on.

Q. (By Mr. Drewes): Did you question the defendant after you discussed that difference of \$450 with any person?

A. I have told it to Mr. Lewis, that there was such a difference, but I haven't gotten any answer on it.

Mr. Hagerty: Move the answer be stricken, your Honor, as not responsive.

The Court: It may go out.

Q. (By Mr. Drewes): Did you discuss the difference of \$450 with the taxpayer at any time after you were retained by him as you have heretofore testified?

A. I believe that I have told him that there was a difference and it looks like it was interest [120] on U. S. Government bonds, but I haven't got an answer from him on it.

Mr. Hagerty: I will object to that, your Honor, and move that the last part of it be stricken as speculative, "looks like it might be interest on bonds."

The Court: It may go out.

Q. (By Mr. Drewes): Where, and when, and who was present at the time that you called the defendant's attention to that difference of \$450?

A. Where, when——

Q. And who was present, to the best of your recollection?

(Testimony of Charles R. Ringo.)

A. I believe I discussed it in Mr. Lewis' office some time ago.

Q. Who else was present?

A. As far as I can remember just Mr. Lewis and Mr. Olender.

Q. And to the best of your recollection when you called that difference to the attention of the taxpayer what did he say?

A. They did not give me an answer in that they were holding that in their own files to determine themselves.

Mr. Drewes: I have no further questions.

Mr. Lewis: No questions.

Mr. Hagerty: Might I ask one question, your Honor?

Recross-Examination

By Mr. Hagerty:

Q. Mr. Ringo, when you first were retained by the defendant you went to see him at his [121]; store, isn't that right?

A. That is my—I think the first time I did. He was brought to my office and I think I talked to Mr. Root first. The sequence of events are a little bit hard to remember right now, but I believe I did see him at his store.

Mr. Drewes: Your Honor, the Clerk was talking to me and I missed the question and the response. May I have the Reporter read it?

(Record read by reporter.)

The Witness: I might clarify that a little bit;

(Testimony of Charles R. Ringo.)

it is not too clear on paper. He did first contact our office, then I called Mr. Root in to find out what the case was all about; then I believe, now, that the sequence of events are going to be hard to determine because you don't remember exactly when you saw——

Mr. Drewes: I move the answer be stricken as not responsive.

The Court: Yes, it may go out.

Q. (By Mr. Hagerty): It is your impression, or from what you learned afterwards, you learned that the defendant had gone to see Mr. Sargent?

A. That is correct.

Q. And Mr. Sargent relayed information to you as a result of which you went to see the defendant at his store?

A. That is right, Mr. Sargent turned the case over to me. [122]

Mr. Hagerty: That is all.

(Witness excused.)

HELEN MICHELI

was called as a witness on behalf of the Government; sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. My name is Helen Micheli, 5534 Broadway; credit clerk at the Gray Shop.

(Testimony of Helen Micheli.)

Direct Examination

By Mr. Drewes:

Q. Miss Micheli, you are employed by the Gray Shop? A. Yes, sir.

Q. In the course of your employment you have access to the records of the Gray Shop?

A. Yes, I have, sir.

Q. In response to a subpoena served upon you have you brought with you the ledger cards of Mr. Olender and Mrs. Olender?

A. Yes, I have, sir.

Q. For the years 1945 and '46?

A. That is right, sir.

Q. And are those records kept in the regular course of business? A. That is right. [123]

Q. May I see them, please?

(Thereupon the witness handed the document above referred to to Mr. Drewes.)

Q. (By Mr. Drewes): There is one sheet on both sides? A. Yes, sir.

Q. And this is a——

A. That is the itemized total.

Mr. Drewes: Limited to the year 1946, your Honor, the Government offers this ledger card and the attached totals as the Government exhibit next in order.

The Court: It may be marked.

The Clerk: United States Exhibit No. 29 in evidence.

(Testimony of Helen Micheli.)

(Whereupon documents identified above were received in evidence and marked U. S. Exhibit No. 29.)

Mr. Drewes: May I state for the record and for the ladies and gentlemen of the jury the exhibit which I have before me shows that in the year 1946 total payments were \$1309.11. I have no further questions.

Cross-Examination

By Mr. Hagerty:

Q. Miss Micheli, I call your attention to the Government's Exhibit No. 29 and to a notation at the top of it in red typewriting. Would you read that? What does that mean?

A. It says "Okay for Daughter Sue to charge."

Q. So this account then was used also by the daughter of [124] the defendant?

A. Well, sir, I really couldn't say. I mean, it could have been.

Q. In other words, you can't tell from the purchases indicated here and the payments indicated whether they were made by the defendant or by his daughter; isn't that true?

A. Well, if they do have the records in the store as yet, we could find out. Now, I don't know, because that has been quite some time ago. We don't keep the sales tags, I don't believe, that long, but they may be there.

Q. In other words, you yourself don't know; is that right?

A. That is right.

(Testimony of Helen Micheli.)

Q. And you can't tell from this record?

A. Not by the record, sir; no.

Q. There are certain payments indicated here which are totaled at the sum of \$1309.11. They are indicated as being cash payments by this ledger sheet.

A. Well, sir, what the—excuse me.

Q. You can't tell from that indication whether or not that was a cash payment or a payment by check, can you?

A. Well, no, because whenever the bookkeeper makes a transaction there it is always posted as check. However, we may have records from way back to where we can indicate whether it is cash or check.

Q. But you can't tell from this record? [125]

A. Not on the ledger; no, sir.

Mr. Hagerty: No further questions.

Mr. Drewes: Thank you; that is all.

(Witness excused.)

JAMES J. DORAN

was called as a witness on behalf of the Government; sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

The Witness: James J. Doran, 519 West Hillsdale, San Mateo; credit manager, W. & J. Sloane.

(Testimony of James J. Doran.)

Direct Examination

By Mr. Drewes:

Q. Mr. Doran, as credit manager of W. & J. Sloane you have access to the ledger accounts and records of that concern? A. I do.

Q. In response to a subpoena have you brought with you the ledger account for Milton Olender for the year 1946? A. Yes, I have.

Q. And those records are kept in the regular course of business? A. Yes.

Q. May I see them?

(Thereupon the witness handed Mr. Drewes the document above referred to.) [126]

Mr. Drewes: The Government offers in evidence the identified records.

The Court: Have you examined them, counsel?

Mr. Lewis: Yes, your Honor. We are going to object to the introduction on the grounds that the amounts shown on that account have been stipulated to in the stipulation.

Mr. Drewes: That is so, your Honor. The records are being offered for the purpose on the grounds that they are material and relevant to the standard of living and scale of living of the taxpayer and his family. If they are accepted into evidence I would ask the Court's permission to read to the ladies and gentlemen of the jury certain selected items that appear on the records that are in front of you. [127]

(Testimony of James J. Doran.)

The Court: What does the plenary paragraph of the stipulation say?

Mr. Lewis (Reading):

“Stipulation entered into by and between the parties to this proceeding by their respective counsel.

“The parties are bound to the stipulation for the purposes of this proceeding only and this stipulation does not *include* either party from offering evidence of any character bearing on or related to the wilfulness or lack of wilfulness or any evidence relating to items of assets, liabilities, or expenditures of Milton Olender or Mrs. Betty Olender which are not included in this stipulation.”

The Court: Objection sustained.

Mr. Drewes: That is all.

(Witness excused.)

Mr. Drewes: If your Honor please, the prosecution has relied on the testimony of Mr. Doran this morning. I regret we have no further witnesses to call. And I should advise also the Court that we have but two witnesses called for this afternoon. They have been asked to be here at 2 o'clock and their testimony shall be relatively brief. I regret under the circumstances——

The Court: Then you suggest we resume at 2 o'clock? [128]

Mr. Drewes: Two o'clock.

The Court: Accordingly, ladies and gentlemen, in the light of the statement made by Mr. Drewes,

we will resume the trial at 2 o'clock this afternoon. The same admonition to you not to discuss the case under any conditions, nor to form an opinion until the matter is submitted to you.

(Thereupon a recess was taken until 2 o'clock p.m. this date.) [129]

September 17, 1952, at 2:00 P.M.

MEDBURY BLANCHARD

was called as a witness on behalf of the Government; sworn.

The Clerk: Please give your name, your address and your occupation to the Court and to the jury.

A. My full name is Medbury Blanchard; I live at 762 Cedar Street in San Carlos.

Q. Occupation?

A. I am—well, I am a public accountant. I am substantially retired at the present time.

Direct Examination

By Mr. Drewes:

Q. Mr. Blanchard, by whom were you employed in the year 1947?

A. I was employed at that time by the Treasury Department as special agent.

Q. And where, Mr. Blanchard?

A. Here in the City of San Francisco.

Q. Do you know the defendant, Mr. Olender?

A. I have met him.

(Testimony of Medbury Blanchard.)

Q. Do you see him in the courtroom?

A. I do.

Q. During the year 1947, Mr. Blanchard, did you have any conversation with Mr. Olender?

A. Yes, I had several conversations with [130] him.

Q. And where did those conversations take place?

A. Two of them that I recall took place at his place of business in Oakland, and two of them or maybe three there, I am not positive—I think two or three at his office in Oakland, and the other two in the Federal Building here in San Francisco.

Q. Do you recall the approximate dates of those conversations or the period of time covered by them, roughly?

A. I couldn't give you the dates of them, sir, except by reference to other matters which would refresh my recollection in all probability. I haven't done so independently. And I would say that those conversations took place over a period of a few weeks, couple of weeks, maybe, a lapse of time in between.

Q. Were other persons present during the course of these conversations?

A. Well, the first conversations, two or three which took place in Mr. Olender's place of business, I believe on one occasion his son was in the room or in the building, in the store there. The other two, as I recall, were with him entirely alone.

Q. During the course of any of those conversa-

(Testimony of Medbury Blanchard.)

tions which you have described, Mr. Blanchard, did the defendant tell you anything concerning his educational background?

A. Yes. He in the course of conversation he stated to me [131] that he had attended the University of California and that he had studied accounting there. I think he said he majored in accounting, if I am not mistaken.

Q. And during the course of any of those conversations with Mr. Olender was anything said by you or by him concerning the preparation by Mr. Olender of tax returns for other persons?

A. He said that he had on occasions prepared tax returns for members of his family and friends.

Q. Did he at any time show you any retained copies of income tax returns?

A. He showed me one, yes. I recall very distinctly showing me a return which he took from a drawer.

Q. He took from a drawer? A. Yes.

Q. Were there any other returns in that drawer?

A. There were papers that looked like them, but I did not examine them, so I could not say they were returns at all. I only know that they looked like it from the point that I saw of them.

Q. Mr. Blanchard, will you state the purpose of your conversations with Mr. Olender?

A. Well, I had been assigned the investigation known as the George Goodman Sales Agency. The case, I believe, originated in New York, and our office was requested to make an investigation [132]

(Testimony of Medbury Blanchard.)

of the amount of the business that had been done there in this Treasury District, 14th Treasury District, by the George Goodman Sales Agency, and I was assigned to make that investigation.

Q. Was it in the course of that investigation that you had the discussions which you have testified with Mr. Olender? A. Correct.

Mr. Drewes: I have no further questions.

Mr. Lewis: No questions.

The Court: Is it agreeable to counsel that the witness be excused?

Mr. Drewes: Yes.

Mr. Lewis: Yes.

(Witness excused.)

TRUMAN H. HARLEY, JR.

was called as a witness on behalf of the Government; sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. Truman H. Harley, Jr.

Q. Your address?

A. Route 1, Box 34-B, Glen Ellen.

Q. Your occupation?

A. Guest ranch operator. [133]

Direct Examination

By Mr. Drewes:

Q. Mr. Harley, by whom were you employed in 1946? A. Bank of America.

(Testimony of Truman H. Harley, Jr.)

Q. Where, Mr. Harley?

A. At the Oakland Main Office.

Q. And what was your position with the bank at that time?

A. Personnel and operations officer.

Q. Mr. Harley, I show you three documents which are entitled "Form TCR-1 Report of currency transactions." One is dated January 10, 1946; one March 26, 1946, and one September 20, 1946, and I ask you if your signature appears thereon? A. It does.

Q. What are those documents, Mr. Harley?

Mr. Hagerty: Just a moment. I didn't quite catch that question. May I have it read, your Honor?

(Question read by Reporter.)

Mr. Hagerty: I will object to that question because the documents speak for themselves.

The Court: In a general way, what are they?—describe them.

The Witness: Merely a report on large sums of cash which were given to the tellers in the bank either for deposit or for the issuance of cashier's checks or other purposes.

Q. (By Mr. Drewes): Was it one of your duties to prepare [134] or supervise the preparation of those documents? A. It was.

Q. And those documents are required to be prepared by the bank?

A. Well, it was the—it wasn't mandatory, I

(Testimony of Truman H. Harley, Jr.)

suppose. It was a suggestion of the Treasury Department that the banks conform—to cooperate with the Government in preparing them, these reports on large transactions, and as far as I know, it was the policy of the Bank of America to see that they were prepared. It was our instructions from head office to see that they were prepared.

Q. The particular reports that you have before you, as to those, Mr. Harley, were they prepared by you or under your supervision?

A. Yes, they were.

Mr. Drewes: May I have them, please? At this time, your Honor, the Government offers into evidence three reports which have been identified by the witness, entitled "Form TCR-1," for the three dates heretofore mentioned.

The Court: Let me see them.

Mr. Drewes: As separate exhibits.

The Court: No objection? You have examined those?

Mr. Lewis: Yes, we have. No objection.

The Court: They may be marked.

The Clerk: U. S. Exhibits 30, 31 and 32 in [135] evidence.

(Thereupon the documents previously identified were received in evidence and marked, respectively, U. S. Exhibits Nos. 30, 31 and 32.)

Q. (By Mr. Drewes): Mr. Harley, I show you another such form, which is dated June 18, 1946, and ask you if you recognize the signature on that

(Testimony of Truman H. Harley, Jr.)

form? A. I believe it is Wayne Tibbetts.

Q. And who was——

Mr. Hagerty: If your Honor please—just a moment. If he is uncertain, I move to strike the speculative statement he has made.

Mr. Drewes: May I ask a few more questions of the witness, subject to the objection?

The Court: Yes.

Q. (By Mr. Drewes): And who was Mr. Tibbetts?

A. He was an officer of the main office.

Q. And was he employed by the Bank of America at the same time that you were employed?

A. Yes, sir.

Q. By the Bank of America? A. Yes, sir.

Q. Can you state positively that that is the signature of Mr. Tibbetts?

A. Yes, sir. I might add this, that the forms were so numerous that they were signed by many officers at the Oakland [136] Main Office. They weren't all entirely signed by me.

Q. That is understood, Mr. Harley. But are you familiar with Mr. Tibbett's signature?

A. Very definitely.

Q. Can you state that this was his?

A. Positively, it is his.

Q. It is his signature? A. Yes.

Mr. Drewes: This will be offered, your Honor, as the next exhibit.

Q. (By Mr. Drewes): Now, Mr. Harley, do you know the defendant, Mr. Olender?

(Testimony of Truman H. Harley, Jr.)

A. Well, no.

Q. What I meant—strike the question.

Do you recognize the defendant Olender?

A. I believe I see him in this room, if you put it that way, yes. I have talked to him, I believe, several times at the Oakland main office. I believe I see Mr. Olender in this room.

Q. And where is he sitting?

A. I believe he is the third man at the end of the table over there.

Q. You say you have talked to him at the bank on several occasions?

A. On several occasions.

Q. And when did those several conversations take place, to [137] the best of your recollection?

The Clerk: U. S. Exhibit No. 33 in evidence.

The Court: So ordered.

(Thereupon the document identified above was received in evidence and marked U. S. Exhibit No. 33.)

A. Well, that would be difficult to say. I suppose the last few years I was at the Oakland main office. He operated his store like other merchants, and they had currency and coin needs and little things like returned checks and things like that that would come up for discussion.

Q. Mr. Harley, did you ever have a discussion with Mr. Olender concerning the Treasury forms which you have just identified?

A. Yes, I did.

(Testimony of Truman H. Harley, Jr.)

Q. Was anyone else present at the time of that conversation?

A. No, I don't believe so. I think he came back to my desk.

Q. Will you state what was said by Mr. Olender and what was said by yourself to the best of your recollection concerning these Treasury forms that have just been admitted into evidence?

A. Well, as I recall it, it seemed that some member of the Government had asked him about these reports submitted from the Bank over there and he seemed surprised and, I suppose, indignant or annoyed about it, that we should have reported it. As I say, all I have to say is that it's the [138] regulations of the Government that regulate banks and we have to make certain reports.

As I say, I know that he told me that somebody was investigating this currency and he says, well, that money was used to buy bonds or cashier's checks, as the forms would show, and I said, well, if that was it, the forms will show, and, that is, the other records will show that the cashier's checks were purchased. It is just a matter of form, as far as we were concerned, in conforming to the letter of the law applicable to Federal banks.

Mr. Drewes: I have no further questions.

Cross-Examination

By Mr. Hagerty:

Q. Mr. Harley, you said that there were many of these forms prepared by the bank and several

(Testimony of Truman H. Harley, Jr.)

officers had signed them, they were so voluminous; is that right? A. That's correct.

Q. Mr. Olender was a depositor of the bank; is that correct? A. Yes, sir.

Q. And well known in the bank; is that correct?

A. As far as I know, yes.

Q. And his reputation in the community for truth, honesty and integrity, as far as you know, was very good?

Mr. Drewes: I will object to that as improper cross-examination.

The Court: Sustained. [139]

The Witness: In fact, I don't know anything about him other than these few brief discussions I had. The man—I don't know of anything to the contrary, that's for sure.

Mr. Hagerty: Thank you, Mr. Harley.

Mr. Drewes: May that be stricken from the record?

The Court: That may go out.

Mr. Hagerty: That he doesn't know anything about him.

The Court: The witness is excused?

Mr. Drewes: No further questions.

Mr. Hagerty: No further questions.

(Witness excused.)

Mr. Drewes: With the Court's permission, I should like to read for the record and the benefit of the jury the brief entries that appear on these records which have just been introduced.

Each of these forms bears the heading of the reporting bank, which is, as you just heard, in each case, the Bank of America, main office in Oakland, and bears the name of the person or organization which is concerned in the transaction, and then in each case——

Well, in the first case it is the Army and Navy Store located 1026 Broadway in Oakland, and then part C is the transaction reported, and on Government Exhibit No. 30, which is the form dated March 26, 1946, the following appears: The date, December 5, 1945, and \$10,000, and \$15,000. [140] Then there is a column for the explanation.

Would you ask the witness to be seated, Mr. Clerk?

The Clerk: Shall I swear the witness?

Mr. Drewes: Swear the witness.

LENUS CARDOZA

was called as a witness on behalf of the Government; sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. Lenus Cardoza, 60 Halkin Lane, Berkeley 7.

Q. Occupation?

A. Assistant auditor, American Trust Company.

Mr. Drewes: To go back, the date in this first item is the 5th of December, 1945, and it shows the amount of \$10,000 and also the amount of \$15,000. Under that and under the explanation, nature of

(Testimony of Lenus Cardoza.)

the transaction column, it says—it reads as follows:

“Issued cashier’s checks for amounts paid with entire cash. Purpose: To buy bonds.”

Then there is another entry on this particular form, November, 1945, and the amount \$25,000. “The nature of the transaction: Issued cashier’s check. Paid cash for purchase of bonds.”

Exhibit 31, the person is indicated, person concerned in the transaction is indicated as M. Olender at 1026 Broadway, Oakland. The transaction is reported—two transactions, [141] the first November 9, 1945, in the amount of \$25,000, and then the form indicates that there were 250 one hundred dollar bills. Similarly on the 20th of November, 1945, the total amount is shown \$25,000, and likewise the transaction is described as 250 one hundred dollar bills. And then as to the statement of the transaction, as follows:

“9 November, 1945,” which is the first of the \$25,000 transactions, “cashed check of \$25,000.” Second, referring to November 20th transaction, “Deposited \$25,000 to commercial account.”

So, in other words, the first of these two transactions the bank cashed a check for \$25,000, paying the defendant 250 one hundred dollar bills, and the second transaction the defendant deposited 250 one hundred dollar bills on the dates shown.

Exhibit 32, the person involved in the transaction is Milton H. Olender, 1026 Broadway. This transaction is shown as of September 19, 1946. There are two entries. \$1,000 in one hundred dollar bills

(Testimony of Lenus Cardoza.)

and \$1500 in \$20 bills, as shown as having been deposited by the defendant.

Exhibit No. 33, the person concerned in the transaction is reported as M. H. Olender, 1026 Broadway, Oakland, California. The date of the transaction—there is but one—is May 29, 1946, and the transaction shown is the purchase of a cashier's check in the amount of \$3,000 for which the [142] defendant paid three one thousand dollar bills.

Direct Examination

By Mr. Drewes:

Q. What is your name, sir?

A. Lenus Cardoza.

Q. And you are employed by the American Trust Company? A. I am.

Q. And in response to a subpoena which has been served upon you, do you have with you two cashier's checks? A. I do.

Q. And do you also have two applications therefor?

A. I do not have the applications. I have the registers covering these checks.

Mr. Drewes: May I see them, please?

(Witness producing documents.)

Mr. Drewes: Would your Honor bear with me for just a moment?

It is stipulated, your Honor, that the two cashier's checks, numbers 7115 and 7146, drawn upon the American Trust Company, and the two register

(Testimony of Lenus Cardoza.)

sheets, which I am holding in my hand, dated May 14th, May 15th, may go into evidence.

The Court: Yes.

Q. (By Mr. Drewes): Do you have photostatic copies with you? A. I do.

Mr. Drewes: Does counsel have any objection to the photostatic copies being substituted for the originals? [143]

Mr. Lewis: That is all right.

The Court: They may be marked in evidence.

The Clerk: U. S. Exhibits 34, 35, 36 and 37 in evidence.

(Thereupon the registers and checks identified above were received in evidence and marked U. S. Exhibits Nos. 34, 35, 36 and 37.)

Mr. Drewes: I will return the originals to you, Mr. Cardoza.

Q. I might ask you, Mr. Cardoza, do you have personal knowledge of the endorsements that appear on those checks? As an officer of the bank do you know or can you identify those endorsements? I am not asking you just to read them.

A. I don't quite understand your question.

Q. Do you recognize the signatures?

A. I do not.

Mr. Drewes: Thank you. I have no further questions.

Mr. Hagerty: No questions.

(Witness excused.)

Mr. Drewes: I very much regret, your Honor, that we have no further evidence to put on today. We hadn't expected the change in plans.

The Court: Accordingly, we may adjourn until tomorrow morning at 10 o'clock. With the same admonition to the jury not to discuss the case under any conditions or circumstances, not to form an opinion until the matter is submitted. [144]

You will have your witnesses in readiness tomorrow, then?

Mr. Drewes: Yes, your Honor.

(Thereupon an adjournment was taken to the hour of 10 o'clock a.m. Thursday, September 18, 1952.) [144-A]

September 18, 1952, at 10:00 A.M.

The Clerk: United States of America vs. Olander on trial.

LEWIS LEAVY

was called as a witness on behalf of the Government; sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. Lewis Leavy, 304 Euclid; dealer in military supplies.

Direct Examination

By Mr. Drewes:

Q. Where is your place of business?

A. 1026 Mission Street, San Francisco.

(Testimony of Lewis Leavy.)

Q. Do you know Milton Olender?

A. I do.

Q. Have you had business dealings with Mr. Olender? A. I have.

Q. Over what period of time?

A. About ten years.

Q. Do you still have business transactions with Mr. Olender? A. Yes, sir.

Q. Mr. Leavy, in May of 1945 did you sell 200 sailor suits to one Lerman?

A. I sold him 200, but I don't remember the exact date.

Q. Mr. Leavy, I hand you two statements, numbers 2512 and 2513, and ask you to examine them and tell me if they refresh [145] your recollection as to when those transactions took place?

A. That is correct.

Q. What were the dates?

A. I didn't get that.

Q. What were the dates then?

A. 5-14-45, one was 5-12 and one was 5-14.

Q. Did you give those statements to Mr. Lerman? A. I believe I did.

Q. And these two statements show the delivery to Mr. Lerman of one hundred sailor suits as to each statement, or a total of 200 for the two days in question? A. Right.

Q. For whom were you acting in connection with that sale? A. For Mr. Olender.

Q. And was he the owner of the suits which were the subject of those two sales to Mr. Lerman?

(Testimony of Lewis Leavy.)

A. Yes, sir.

Mr. Drewes: I shall offer these two invoices as Government's next in order, your Honor.

Mr. Lewis: No objection, your Honor.

The Court: They may be marked in evidence.

The Clerk: United States Exhibits 38 and 39 in evidence.

(Thereupon the invoices above referred to were received in evidence and marked United States Exhibits Nos. 38 and 39, [146] respectively.)

Q. (By Mr. Drewes): Mr. Leavy, I will now show you two cashier's checks drawn on the American Trust Company, each in the amount of \$2500, which have heretofore been admitted in evidence in this trial and are marked as United States Exhibits No. 34 and No. 35. I will ask you to examine them and to examine the endorsements on the back of each and tell me if those were the checks which were tendered to you by Mr. Lerman in payment for the two sales to which you have just testified. You will note the dates and the amounts, the endorsements.

A. Yes, sir.

Q. What did you do with those two checks, Mr. Leavy?

A. Turned them over to Mr. Olender.

Q. After having endorsed them, your endorsement appears on the back of each check?

A. That is right.

Q. Mr. Leavy, in the closing months of 1945 and

(Testimony of Lewis Leavy.)

early 1946 did you have occasion to make other sales of sailor suits for Mr. Olender? A. Yes.

Q. What were those?

A. I sold between 250 or 300 or 320, I don't remember exactly; in about that amount.

Q. In the closing months of 1945, Mr. Leavy, did you have occasion to travel to New York on behalf of Mr. Olender [147] for the purpose of purchasing sailor suits?

A. Not on behalf; I went there on my own business.

Q. In connection with that trip did you attempt to purchase sailor suits for Mr. Olender?

A. I did.

Q. And did you take with you funds belonging to Mr. Olender for that purpose? A. I did.

Q. And to the best of your recollection how much did you have with you?

A. Oh, anywhere between six and seven thousand dollars. I don't know exactly how much it was.

Q. Somewhere in the neighborhood of six and seven thousand dollars? A. Yes.

Q. Could it have exceeded seven thousand dollars?

A. I would remember that; I don't believe so.

Q. Not by a great amount, in any event?

A. No.

Q. Do you recall the form in which you took those funds? A. No, I do not.

Q. You do not recall whether it was in the form of cash, checks, or otherwise?

(Testimony of Lewis Leavy.)

A. I wouldn't remember that.

Q. What was the source of the six or seven thousand dollars [148] that you took with you, Mr. Leavy?

A. I don't get that.

Q. You testified, Mr. Leavy, that you had made other sales of sailor suits for Mr. Olender?

A. That is right.

Q. Did the six or seven thousand dollars which you took with you come from those sales which you have testified?

A. That is right.

Q. And you took that money with you to New York at the instructions of Mr. Olender?

A. That is right, to buy small sizes of sailor suits.

Q. To buy small sizes of sailor suits?

A. Yes, sir.

Q. It was his money?

A. It was his money.

Q. It had come into your possession as a result of sales of his suits which you had made for him; is that correct?

A. That is correct.

Q. Mr. Leavy, have you brought with you your ledger sheets for the year 1942?

A. No, you asked me for '44 to '46 or '47—no, '42. I have got them all here, yes.

Q. We asked you for '45 and '46; it was my impression that you had brought them all.

A. It is all of them. [149]

Q. For what period of time do they cover?

A. From 1942 until '47.

Q. Do any of the transactions in which you en-

(Testimony of Lewis Leavy.)

gaged on behalf of Mr. Olender to which you have testified appear in your books?

A. You are talking regarding sailor suits?

Q. That is correct, the sailor suits, the transactions to which you have testified?

A. No, sir, for the reason that I was not in that business. I just acted as an agent and buying those sailor suits for Mr. Olender, I just done it as a favor for him because they were very difficult to get at the time.

Q. Just one or two further questions, Mr. Leavy. Refer again to the six or seven thousand dollars that you took to New York with you. To whom, if anyone, did you turn over that money?

A. M. Saraga.

Q. And who was he?

A. He was in the business of handling military supplies, and he had some sailor suits at the time or was having them made.

Q. And you turned the money over to him for the purpose of purchasing from him sailor suits?

A. That is right, for Mr. Olender.

Mr. Drewes: No further questions. [150]

Cross-Examination

By Mr. Hagerty:

Q. Mr. Leavy, you are acquainted with the defendant, Mr. Olender? A. I am.

Q. How long have you known him?

A. Since about '42.

(Testimony of Lewis Leavy.)

Q. And you know him through business that he has done with you? A. That is all.

Q. Why were you going to make these purchases on his behalf in New York?

A. On sailor suits?

Q. Yes.

A. Because he was a very good account of mine and I tried to help him. They were very difficult to obtain.

Q. Would you tell his Honor and the ladies and gentlemen of the jury the general conversation you had with Mr. Olender when you started out to get these for him?

Mr. Drewes: Objected to as no proper foundation being laid, apparently calls for a recital. I suggest that counsel ask specific questions so that objections may be posed if they are advisable.

The Court: I will allow that. Overruled.

A. About 1943 Mr. Olender asked me time and time again whether I could obtain some sailor suits for him. [151]

Mr. Drewes: Object to that as hearsay testimony, your Honor, and move that it be stricken.

The Court: Overruled.

The Witness: And I said, "the next time I go to New York I will try and obtain some for you." So when I went to New York, I believe it was in 1944, I made some arrangements with a concern, George Goodman, by which I purchased about \$20,000 worth of sailor suits for him.

Q. (By Mr. Hagerty): These suits were subse-

(Testimony of Lewis Leavy.)

quently delivered to Mr. Olender in Oakland, is that true? A. That is right.

Q. Were these suits merchandisable suits for Mr. Olender? In other words, were they the proper sizes or the proper qualities that they had been represented to be?

Mr. Drewes: Objected to, your Honor, as improper cross-examination.

The Court: What materiality would that have?

Mr. Hagerty: Well, this is preliminary, your Honor, to lead up to this sale to Mr. Lerman that the U. S. Attorney has just brought in, to explain why the sale was made of these goods of Mr. Olender's to Mr. Lerman who is a nearby competitor of Mr. Olender's.

The Court: In that case the objection is overruled.

A. When Mr. Olender got these suits several weeks later he complained to me that the sizes were not what he bought. [152] The sizes that were on the suits as 34 was practically a 38. The size that was a 38 was a 42 and he said I have got to try and get rid of some of those suits for him because he cannot sell large sizes for the reason that he had no tailor to cut down the sizes. I told him that I would try and dispose of some of the suits to some of my customers for him.

Q. Then subsequently did you dispose of some of them to Mr. Lerman?

A. I did, 200 to Mr. Lerman.

(Testimony of Lewis Leavy.)

Q. Mr. Lerman operates a store in the near vicinity of Mr. Olender?

A. Right opposite Mr. Olender.

Q. How is it that you could dispose of these suits to Mr. Lerman, a competitor of Mr. Olender's in the same city?

A. He had a tailor who could cut down suits.

Q. In the course of that transaction did you ever tell Mr. Lerman the source of these suits?

A. No, sir, never told him who they came from.

Q. Why didn't you?

A. Because I don't believe that Mr. Lerman would have bought them, and I don't believe Mr. Olender would have sold them to Mr. Lerman on account of competitors.

Q. Mr. Leavy, do you know Mr. Whiteside or Mr. Root sitting at this table?

A. I believe I do, yes. [153]

Q. Have you been questioned by both those men at your place in reference to these transactions?

A. I believe I have, yes.

Q. Did they take a statement from you there?

A. I believe they have.

Q. And in that statement did you fully outline what your testimony has been here today?

A. Part of it, yes.

Mr. Hagerty: No further questions.

Redirect Examination

By Mr. Drewes:

Q. It is your testimony, Mr. Leavy, that you

(Testimony of Lewis Leavy.)

undertook to sell Mr. Olender's sailor suits to Mr. Lerman because they were all large sizes?

A. Well, he complained that they were large sizes. I never examined the suits. He just told me they were large sizes and he couldn't use them.

Q. And asked you to sell them for him?

A. That is right.

Q. And then you did sell them as you have testified to Mr. Lerman? A. I did.

Q. You have testified, Mr. Leavy, that the Government's Exhibits No. 38 and No. 39 were prepared in your office? A. Yes.

Q. You have identified them. Would you please read to the [154] ladies and gentlemen of the jury the sizes and numbers of each suit covered?

A. Ten 35's, twenty 36's, twenty-five 37's, twenty-five 38's, ten 39's, ten 40's. Fifteen 35's fifteen 36's, twenty-five 37's, twenty-five 38's, ten 39's, and ten 40's, but Mr.—

Mr. Drewes: That is all, Mr. Witness. I have no further questions.

Recross-Examination

By Mr. Hagerty:

Q. Mr. Leavy, now in reference to these enumerations of sizes on the invoice did you find or learn subsequently that those sizes indicated on the invoices did not actually correspond with the goods?

A. That is what Mr. Olender told me, that the tickets on the suits were not as marked, but I never examined them.

(Testimony of Lewis Leavy.)

Q. Now, when he had originally asked you to help him get these suits did he specify that he wanted small sizes? A. That is right.

Q. Did he tell you that he had no market for the larger size suits? A. He did.

Mr. Hagerty: No further questions.

Mr. Drewes: That is all, Mr. Witness. Would you be kind enough to wait in the witness room? We may wish to call you again. [155]

MOE SARAGA

was called as a witness on behalf of the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. Moe Saraga, 656 Broadway, New York City, merchant.

Direct Examination

By Mr. Drewes:

Q. Mr. Saraga, there has been testimony this morning in this trial to the effect that late in 1945, a Mr. Leavy travelled from San Francisco to New York, and while there he gave you a sum of money, between six and seven thousand dollars for the purpose of buying from you sailor suits on behalf of Mr. Olender. Do you recall that transaction?

A. I do.

Q. Have you brought with you your books of account in response to a subpoena served upon you?

A. I did.

(Testimony of Moe Saraga.)

Q. Does that transaction appear in your books?

A. I believe it does.

Q. Will you please find it for me? Have you located it? A. I have, sir.

Q. Will you point it out to me, Mr. Saraga? There are total receipts by you from Mr. Leavy—how many receipts were there, Mr. Saraga?

A. Five. [156]

Q. And as of what date?

A. As of July, 1945.

Q. July of 1945. Well, Mr. Saraga, those apparently are not the transactions to which Mr. Leavy has heretofore testified. He testified that late in 1945 he tendered the sum of six or seven thousand dollars to you for the purposes heretofore mentioned.

A. We have an entry here, August 1st, \$7,000, and one entry here of \$3300.

Q. What were the dates of those two entries?

A. August 1st, and there is one here for \$6500.

Q. May I have that again?

A. Another one in August of \$6500.

Q. In August of 1945? A. Right.

Mr. Lewis: Your Honor, I object to the witness testifying as to his books until they are properly identified and put into the record.

Mr. Drewes: Well, your Honor, I have asked the witness to find the entry in the books. I am unable to do so.

The Court: Counsel, have you had an opportunity to examine these books?

(Testimony of Moe Saraga.)

Mr. Lewis: No, I haven't examined those books.

The Court: I suggest that counsel examine the page in question and then we can have some clarification. [157]

The Court: Are those the only transactions referred to in the year 1945?

The Witness: Yes, your Honor.

The Court: The only transactions you had with Mr. Leavy?

The Witness: Yes.

The Court: You might examine them, Mr. Lewis.

Mr. Drewes: I might say that we have not had an opportunity to examine the books either, except very briefly, ten minutes this morning. It might be wise if we took a very short recess, your Honor, in which we would have a chance to examine them.

The Court: All right. How long will it take you, ten minutes or so?

Mr. Drewes: I should think so. It depends on what we find.

The Court: We will take a very short recess, ladies and gentlemen, in order to permit counsel on both sides to examine these books of account in the light of the disclosure made, and the same admonition to you not to discuss the case or form an opinion.

(Short recess.) [158]

Q. (By Mr. Drewes): Mr. Saraga, what is the name of your business? A. M. Saraga.

Q. Is that a corporation, partnership?

A. At present it is a corporation.

(Testimony of Moe Saraga.)

Q. It is a corporation and you are the president?
A. That's right.

Q. Do you have the books before you from which you testified earlier?
A. Right, I have.

Q. Those are the books and records of your corporation?

A. Those are the books and records of the company.

Q. Of the company?
A. M. Saraga.

Q. Do I understand that there is more than one organization?

A. These books here are from M. Saraga, not the corporation books.

Q. Not the corporation books?
A. No.

Q. What is M. Saraga, a proprietorship or partnership?

A. That was just a single owner.

Q. Do I understand that you have incorporated since?
A. Since.

Q. Since the date——
A. Since '45. [159]

Q. ——since the date of those records, the dates those records bear?
A. Yes, sir. Yes, sir.

Q. I see. Were the books and records which you have before you kept by you or under your supervision, Mr. Saraga?
A. Yes.

Q. Were they kept in the regular course of business?
A. Yes.

Mr. Drewes: The Government will ask they be introduced in evidence.

The cash receipts and cash disbursements books are the only ones in which we are interested.

(Testimony of Moe Saraga.)

The Court: Pardon me, counsel. You wish to make an offer now of the books?

Mr. Drewes: I withdraw the offer for a moment. Yes.

Q. I want the cash receipts and cash disbursements books only, Mr. Saraga. May I have those two for the years '45 and '46. Do they consist of these two volumes? What's this? Are all three of them cash receipts—

A. There is one more book here. Is there another book here?

The Court: May the record show, counsel, that you have had an opportunity to examine these books?

Mr. Hagerty: Yes.

Mr. Lewis: Yes.

The Court: You are satisfied with the examination? [160]

Mr. Hagerty: Yes.

Mr. Lewis: Yes.

Mr. Drewes: I believe, your Honor, that all three—

The Court: In the future it will save considerable time—may I interrupt you temporarily—in connection with books of account and the like, if you have a fair exchange between counsel in advance.

All right.

Mr. Drewes: They will be offered at this time. I believe the three volumes can be marked as one exhibit.

(Testimony of Moe Saraga.)

The Court: Are there specific pages you are going to refer to?

Mr. Drewes: I am going to refer to specific pages. There are only three or four of them.

The Court: I suggest, so that the gentlemen may have his books of account, that you have or cause to be photostated the pages to which reference may be made. The Clerk of the Court will undertake to do that, have the Government photostat them, and have a copy made for defense counsel, and have a copy made for yourself, one for filing, and return the books to this gentleman.

Mr. Drewes: Very well. That shall be done.

The Court: Just the pages in question.

Mr. Drewes: There are very few pages involved.

The Court: Then the books may be returned to you (indicating witness). [161]

The Clerk: U. S. Exhibits 40, 40-A and 40-B in evidence.

(Thereupon three volumes, M. Saraga cash receipts and cash disbursements books, were received in evidence and marked United States Exhibits 40, 40-A and 40-B in evidence.)

The Court: The witness just said he hasn't any particular use for the books in question. So they may remain here and then be delivered to you.

The Witness: That's right.

The Court: All right. That simplifies it.

Q. (By Mr. Drewes): I will now return these books to you, Mr. Saraga. They have been introduced in evidence.

(Testimony of Moe Saraga.)

Mr. Saraga, will you—

May I state, your Honor, it has been agreed that I might lead the witness to the appropriate page in the interest of saving time.

Will you turn to page 80 of your cash receipts book for 1945, Mr. Saraga?

Mr. Hagerty: Counsel, may we have the exhibit number of the cash receipts book?

The Court: All right.

Mr. Drewes: The witness is referring to Exhibit No. 40, counsel.

Q. You have that page? A. Page 80.

Q. Does there appear thereon a receipt from one Leavy in the [162] amount \$1350? Cash receipts for the year 1945, do you have the right book?

A. This is 1946 I am looking at.

Q. Turn to your 1945. A. '45.

Q. I believe it is on page 80, Mr. Saraga.

A. I have it.

The Clerk: With reference to cash receipts book 40-B.

Q. (By Mr. Drewes): Does there appear thereon, Mr. Saraga a receipt in the amount of \$1350 from one Leavy? A. Right.

Q. And is the date the 31st of July, 1945?

A. Yes, sir.

Q. Similarly on that page does there appear the receipt of five checks in the amount of \$3600 from Mr. Leavy? A. There is.

Q. On the same date? A. There is.

Q. Now will you please turn to page 34, and does there appear thereon a receipt of \$7,000.09?

(Testimony of Moe Saraga.)

A. There does.

Q. From one Leavy dated the 2nd of August, 1945?

A. Yes, sir.

Q. And will you kindly turn to page 86, Mr. Saraga. Do you have that page? [163]

A. Yes, sir.

Q. And does there appear thereon a receipt of \$6500 from the Army and Navy Store dated August 6th?

A. There is.

Q. 1945?

A. Yes, sir.

Q. Now, if you will turn, Mr. Saraga, to page—to your disbursements—I haven't the page number. November, 1945. Page 127, disbursements for 1945.

A. Yes, sir.

Q. Does there appear thereon a disbursement—do you have it—in the amount of \$7725, dated the 15th of November?

A. I can't see that one. I must be looking at the wrong book.

Q. Do you have the right book, 1945 disbursements?

A. 1945 cash disbursements.

Q. Page 127?

A. Page 127.

Mr. Hagerty: The Army and Navy Store—there it is.

A. Oh, yes.

Q. (By Mr. Drewes): Does there appear thereon a disbursement to the Army and Navy Store in the amount of \$7725, Mr. Saraga?

A. There is.

Q. Do you recall, Mr. Saraga, the nature of that disbursement or why the disbursement was [164] made?

(Testimony of Moe Saraga.)

A. There was a refund of \$6500, a deposit we received, and the difference between \$6500 and \$7725 was—there was also a refund of 49 uniforms at \$25 each, since we had not completed on the first order.

Q. And why was the refund—what brought about the refund of \$6500?

A. We couldn't deliver the goods.

Q. And the difference between the \$6500 and the sum of \$7725, I understand, was a refund of an overpayment?

A. Of an overpayment.

Q. Now if you will turn to your receipts book for 1946, page 80—I beg your pardon, page 50.

A. 50?

Q. Page 50, Mr. Saraga, of 1946. You have got that page?

A. Yes, sir.

Q. Do you find thereon a receipt in the amount of \$7724 and dated March 19, 1946?

A. I don't know if I am looking at the right book. Is this 1946?

Q. 1946, March 19th.

A. March 19th—

Q. Page 50. The amount is \$7724.

Mr. Lewis: Your Honor, I would like to object to that. That is, it may be permitted to go in subject to the motion to strike if they do not connect it up. [165]

The Court: With that understanding then, it may be admitted, counsel reserving motion to strike.

The Witness: I have it, sir, \$7724.

Q. (By Mr. Drewes): And that was shown as a receipt from whom?

A. Lewis Leavy.

(Testimony of Moe Saraga.)

Q. From Lewis Leavy? A. Yes.

Q. And now if you will finally turn to page 33 of your disbursements book for 1946. 1946, again.

A. Yes, I am looking.

Q. Disbursements. A. Disbursements.

Q. Page 33. A. 1946 or '45?

Q. '46, Mr. Saraga. A. Yes.

Q. Do you have that page?

A. Yes, cash disbursements.

Q. Is there a disbursement shown thereon for June 24, 1946, in the amount of \$7724?

A. Yes, sir.

Q. And to whom is that disbursement made as shown by the book?

A. To Lewis Leavy. [166]

Q. To Lewis Leavy. A. Yes.

Q. Now, Mr. Saraga, you have testified that you know Mr. Leavy——

Mr. Lewis: I want my objection to run, your Honor, subject to the motion to strike, to this whole line of testimony.

The Court: It may be presented in the record. The objection is noted.

Q. (By Mr. Drewes): You have testified that you know Lewis Leavy? A. Yes.

Q. That you have had business dealings with him? A. Yes, sir.

Q. Do you know Mr. Milt Olender?

A. No, I have only met him the first time yesterday.

Q. The first time yesterday? A. Yes.

(Testimony of Moe Saraga.)

Q. You have testified that a number of entries in your books indicate receipts and disbursements from Lewis Leavy. In those dealings with Mr. Leavy did you understand that he was dealing for himself or someone else?

A. For someone else.

Mr. Lewis: Object to that.

The Court: Overruled. [167]

Mr. Lewis: It is based on hearsay.

The Court: Overruled.

Q. (By Mr. Drewes): And for whom was he dealing?

The Court: Will you repeat the answer?

A. For someone else.

Q. (By Mr. Drewes): For whom was he dealing or whom did he represent?

A. Mr. Olender.

Q. Mr. Milton Olender? A. That's right.

Q. And you have testified as to certain entries——

Mr. Lewis: I would like to have the record read and exception is noted on each of these statements to the ruling that they can go in as to Mr. Leavy.

The Court: The objection may be noted. The objection is overruled.

Q. (By Mr. Drewes): You have testified as to one or two items in your books wherein transactions with the Army and Navy Store are noted.

A. Yes, sir.

Q. Who is the owner of that organization?

A. Mr. Olender.

Mr. Lewis: I object to that as merely an opinion,

(Testimony of Moe Saraga.)

as asking for a legal conclusion of this witness.

The Court: If he knows in the trade and in the trade [168] parlance who the owner of the Army and Navy Store is—do you know that?

A. I was told that it is Mr. Olender, owns the business.

Q. By whom? A. By the trade.

Q. (By Mr. Drewes): You know with whom you customarily deal, do you not? A. I do.

Q. And when you testify that there are entries in your books reflecting transactions with the Army and Navy Store, you knew that that store was owned by and operated by Mr. Olender?

A. I did.

Q. Mr. Saraga, you have testified as to two disbursements which appear in your books. Have you brought with you in response to a subpoena your retained cancelled checks reflecting those two disbursements? A. I have.

Q. Will you hand them to me, please?

A. (Witness producing documents.)

Q. These two checks bear your signature, do they not? A. They do.

Mr. Drewes: I understand it is stipulated these two checks may be accepted into evidence, your Honor.

The first check dated November 15, 1945— [169]

The Court: And the amount, will you read the amounts, counsel, so we may follow these?

Mr. Hagerty: We have no objection.

(Testimony of Moe Saraga.)

Mr. Drewes: In the amount of \$7725, the amounts heretofore read from the books.

The Court: And paid to the order of whom?

Mr. Drewes: Pay to the order of the Army and Navy Store.

The Court: And the other check reads?

Mr. Drewes: The second check is dated June 24, 1946, in the amount of \$7724 and is payable to the order of Lewis Leavy.

The Court: Who signed these checks?

Mr. Drewes: Mr. Saraga testified, your Honor, he signed those checks.

The Court: You signed those checks?

The Witness: I did.

The Court: They were charged to your account?

The Witness: That's right.

The Court: They may be admitted.

The Clerk: U. S. Exhibits Nos. 41 and 42 in evidence.

(Thereupon the checks above identified were received in evidence and marked, respectively, U. S. Exhibits Nos. 41 and 42.)

Q. (By Mr. Drewes): Mr. Saraga, I hand you Exhibit No. 41. [170] Will you look at the reverse side of that exhibit and tell me what endorsements appear thereon?

Mr. Hagerty: I will object to that, your Honor. The document speaks for itself.

The Court: Overruled.

A. Army and Navy Store, M. Olender.

(Testimony of Moe Saraga.)

Q. (By Mr. Drewes): And as to Exhibit 42, will you please read the endorsements that appear thereon?

A. Lewis Leavy, Milton H. Olender.

Mr. Drewes: Thank you. I have no further questions.

Cross-Examination

By Mr. Lewis:

Q. Mr. Saraga, you did not know Milton Olender at all during the period of these transactions?

A. That's right.

Q. You dealt entirely with Mr. Leavy?

A. That's right.

Q. Would you have sold Mr. Olender directly during this period of shortages?

Mr. Drewes: Objected to as calling for the opinion and conclusion of the witness.

Mr. Lewis: He knows whether he would have sold him or not.

The Witness: Would you repeat that question?

Q. (By Mr. Lewis): Would you have sold Mr. Olender at all during the period of 1945 and '46 if it had not been for Mr. [171] Leavy?

A. We were not in a position to sell any goods at the time.

Q. There was a shortage and you were taking care of your regular customers?

A. There was a shortage at that time.

Q. And Mr. Leavy was a large customer of yours?

A. That's right.

Q. You had many transactions with him?

(Testimony of Moe Saraga.)

A. That's right.

Q. Now calling your attention to the Exhibit 40, page 80, cash receipts, July 31, 1945, \$1350.

A. Page 80—yes, sir.

Q. It is the first item there from Lewis Leavy, \$1350. Do you know of your own knowledge whether that cash receipt was for Mr. Leavy's purchases or Mr. Olender's at the same time Mr. Olender sent you the \$18,000 worth of checks?

A. I am trying to find that item. Page 80, you say?

Q. Yes. A. \$1780, is it?

Q. \$1350 is the first item and then there are five checks for \$3600?

A. I am sorry, but I don't see that item on page 80 here.

The Court: Will you help him, Mr. Lewis, please? Show him where those items are.

Mr. Lewis: I don't think you have the right book there. [172]

Mr. Drewes: Try 40-B.

Mr. Lewis: Here it is.

A. The first item?

Q. Yes, the first item \$1350. Do you know whether that item was received from Mr. Leavy for his own account or Mr. Olender's account?

A. That was for another account of Mr. Leavy's.

Q. That was not Mr. Olender's?

A. No, not that item.

Q. Turn to page 84 of the 1945 book. There is an item there \$3036.56, and also an item Lewis

(Testimony of Moe Saraga.)

Leavy \$7,000.09. Can you tell from your books whether the first item of \$3036.56 or from your own knowledge, was for Mr. Olender's account or some other party of Mr. Leavy's?

A. The item of \$3036.56 was for some other account of Mr. Leavy's.

Mr. Lewis: That is all.

Your Honor, I would like to renew my motion to strike those two items of \$3036.56 on page 84, and on page 80 the item \$1350, as this witness has testified they were some other account and were not identified as Mr. Olender's account.

Mr. Drewes: What was the first item you referred to?

Mr. Lewis: \$1350.

Mr. Drewes: And the other one?

Mr. Lewis: \$3036.56. It appears—there was conversation [173] when he was reading it.

Mr. Drewes: The \$1350 item, your Honor, may go out. I have no objection to that.

As to the other item, \$3036.56, I don't recall questioning the witness about that item.

Mr. Lewis: Well, it appears under Lewis Leavy. It was not our client's item and we didn't want it to be in evidence, your Honor.

Mr. Drewes: That may go out.

The Court: Both items may be stricken from the record then, and the Jury is entitled to disregard reference thereto under the stipulation of counsel. They are entirely irrelevant to this controversy.

Mr. Lewis: That's correct.

(Testimony of Moe Saraga.)

The Court: Are you finished with this witness?

Mr. Lewis: Yes, your Honor.

Mr. Drewes: Yes.

The Court: There are no further questions, because when I release him I assume you will return to your home, will you?

The Witness: Yes, sir.

Mr. Drewes: That's correct.

Mr. Lewis: That's correct.

The Court: You are sure now there are no further questions?

Mr. Lewis: We will stipulate.

The Court: When are you leaving? [174]

The Witness: I would like to leave this afternoon.

The Court: This afternoon by plane, are you?

The Witness: Yes.

Mr. Drewes: It is so understood.

The Court: All right, sir, you may be excused. And the witness is leaving the books here on the condition they be returned.

Mr. Drewes: They will be returned to him at the end of the trial.

(Witness excused.)

LEWIS LEAVY

was recalled as a witness on behalf of the Government, previously sworn.

The Clerk: Please restate your name for the record.

A. Lewis Leavy.

(Testimony of Lewis Leavy.)

Direct Examination
(Resumed)

By Mr. Drewes:

Q. Mr. Leavy, I show you Government Exhibit No. 42, which is a check payable to yourself and drawn by Mr. Saraga. A. Yes, sir.

Q. This has previously been introduced in evidence. Will you tell me—will you examine that check? A. Yes.

Q. Examine the endorsements on the reverse side. [175] A. Yes, sir.

Q. And tell what disposition you made of that check? A. I turned it over to Mr. Olender.

Q. Do you know Mr. Olender's signature?

A. Oh, I have seen it. I think—I think——

Q. Does that appear to be his signature?

A. The last part of it. I remember how he wrote his "Olender"—I think that is correct.

Q. That appears to be his signature?

A. Yes.

Q. When you testified earlier this morning, Mr. Leavy, you could not recall persons to whom you had made sales of Mr. Olender's suits in 1945 beyond the specific sales to Mr. Lerman. Upon further reflection do you recall now any additional sales made by you? A. No, I don't.

Q. In that period of time? A. No.

Q. And how many suits did you testify that you had sold beyond those?

A. From 250 to 300, 325. I don't remember exactly. It was a small amount.

(Testimony of Lewis Leavy.)

Q. Referring again to Exhibit No. 42, you testified that you turned this check over to Mr. Olender?

A. Why, Mr. Leavy? [176]

A. Because they belonged to him.

Mr. Drewes: I have no further questions.

Mr. Hagerty: No questions, your Honor.

The Court: This witness is excused?

Mr. Drewes: He is excused.

Mr. Lewis: Yes.

The Court: Same order. The witness is excused.

The witness may leave.

The Witness: I can leave?

The Court: Yes, you can leave the jurisdiction.

Mr. Drewes: Your Honor, may the witness be excused on the understanding that he may be subject to recall later in the trial?

The Court: Where is your home?

The Witness: My office is right down the street here.

The Court: You live in this jurisdiction, do you?

The Witness: That's right.

Mr. Drewes: Subsequently it may be necessary to recall him.

The Witness: Okay, I will be at the office any time you want me.

(Witness excused.)

SETH L. ROOT

was called as a witness on behalf of the Government, sworn. [177]

The Clerk: Please state your name, your address and your official capacity to the Court and to the Jury?

A. Seth L. Root, 937 Liberty Avenue, El Cerrito, California. Internal Revenue Agent, U. S. Treasury Department.

Direct Examination

By Mr. Drewes:

Q. Mr. Root, you were assigned to this particular case at the beginning of its investigation?

A. Yes, that is correct.

Q. You have been following the case until the present moment? A. Yes.

Q. State if you will when you were first assigned to begin the investigation of the case?

A. Well, the returns for 1944 and '45 were assigned to me some time in the early part of December of 1947.

Q. Will you state particularly the origin of the investigation? A. I don't—

Q. Will you state then—let me reframe the question.

Will you state, please, how the investigation began?

A. Well, when the returns came to me there were associated with the returns certain information from—

Q. Go ahead.

(Testimony of Seth L. Root.)

Mr. Lewis: I object, your Honor, to this questioning as to why the investigation started. Let him state what he [178] found.

The Court: I will sustain the objection.

Q. (By Mr. Drewes): Mr. Root, I show you the Government's Exhibits 30 through 33, inclusive, which have been identified as reports of unusually large transactions of currency, Treasury forms usually referred to as "TCR's," and ask you if those were given to you in connection with the taxpayer's returns? A. Yes, they were.

Q. And you undertook to make an inquiry as to the nature of those transactions reflected on Government's Exhibits 30 through 33?

A. Yes, those were checked subsequently.

Q. You have, Mr. Root, been seated at counsel table since this trial began this week?

A. Yes.

Q. And you have heard the witness, Mr. Blanchard, testify as to certain transactions which he was making inquiries entered into by one Goodman?

A. Yes.

Q. Was that Goodman matter, the report of the Goodman matter, referred to you in connection with your receipt of the taxpayer's '44 and '45 returns?

A. It was.

Mr. Lewis: I will object, your Honor, to that question, [179] what reports were referred to him at the start of his investigation. I think counsel should confine his statements to what he found in the investigation.

(Testimony of Seth L. Root.)

The Court: Well, this is a preliminary question.

Mr. Drewes: It is all preliminary, your Honor.

The Court: I will overrule the objection. He was assigned to that phase of the matter, and we will proceed from there.

Q. (By Mr. Drewes): Your answer is "yes"?

A. Yes.

Q. Did you in the course of the investigation interview the defendant Mr. Milton Olender?

A. Yes, that was the first step in my examination of the returns.

Q. Actually I presume you must have interviewed him on a number of occasions?

A. Yes.

Q. Can you state to the best of your recollection when you first talked to the defendant?

A. I believe it was December the 29th of 1947. We had a preliminary meeting in my office and at the time Mr. Olender said that he was very busy taking year-end inventory and asked if I could defer the commencing of the examination until after the first of the year, and I said that was agreeable.

Q. And did you then agree upon a subsequent date for [180] extensive conference?

A. Yes, he said if I could get in touch with him sometime after January the 10th of '48 he would be agreeable.

Q. And then subsequent to that date did you meet with him? A. Yes.

Q. And where, Mr. Root?

A. January 12th I met with him at his place of business, 1026 Broadway in Oakland.

(Testimony of Seth L. Root.)

Q. Was there anyone else present at the time?

A. There were sales personnel in the store. I mean, I was working in the back end of the store at a small table there at the side of the room.

Q. How much time did you spend in the store on that occasion? A. Well—

Q. Approximately.

A. Several days I spent there. I don't recall.

Q. You were there continuously for several days?

A. Well, I was out for lunch, and whether I had other matters going—I couldn't say that I was there all day every day, but I was there the good part of several succeeding days, yes.

Q. Now during the course of your—of that period of time, when you were in the store and during the course of your conversations over that period of time with the defendant, [181] did you make inquiries of him as to the management and operation of the Army and Navy Store? A. Yes.

Q. And as a result of those inquiries what did you learn concerning the operation and management of the store?

A. Well, he had several employees in this store. He is, however, the sole proprietor of the store and everything.

Q. Was he the manager of the store?

A. He is the manager. He has no one who—no purchasing agent or anything like. He supervises.

Q. He does not employ a manager?

(Testimony of Seth L. Root.)

A. No.

Q. He does the active management and operation of the store himself?

A. Yes. There may be some one in charge when he steps out, but he essentially is the manager when he is there.

Q. How many salesmen did he have, roughly?

A. Oh, at the time I think there were two or three. I don't recall the exact number.

Q. Did he employ a bookkeeper?

A. Only on a part-time basis. I believe there was a girl that he said came in on the average of about one hour a day to post transactions which might have occurred. Now whether she came in every day or not, it was on the average of one hour a day. [182]

Q. Do you recall her name?

A. Her name is Vera Manger.

Q. Do you recall whether the defendant told you where she was employed?

A. Yes.

Q. Elsewhere?

A. She was employed as a full-time bookkeeper at the Dorfman Hat Company, I believe the title of the firm is. Around the corner from Mr. Olander's place of business.

Q. In connection with the maintenance of the books of the Army and Navy Store, did the defendant tell you what his activities were in connection therewith.

A. Well, I mean—

Q. Specifically what—I will withdraw the question and rephrase it.

(Testimony of Seth L. Root.)

Specifically what if anything did the defendant tell you he did in connection with the maintenance of the books and records of the store?

A. Well, he would supervise the maintenance of the books and records, in the sense that this is a, well, not a one-man store but a smaller store, and so that he was in a much more intimate contact of books than one—than would be true in a larger firm. He would furnish the data to the girl for posting and I think, in fact, some of the posting was done by him. I can recall some instances where there was [183] some postings that he made.

Q. You examined the books and records of the Army and Navy Store in the course of your visit?

A. Yes, I did.

Q. To the best of your recollection will you describe of what they consisted?

A. Well, there was a cash book which reflected the receipts or sales of the business, a check register which would reflect the disbursements. I believe that all the disbursements were eventually accounted for by check, in that any cash disbursements out of the register were reimbursed by checks drawn on the firm. There was a general journal and a ledger.

Q. Specifically, Mr. Root, how were receipts handled?

A. Mr. Olender told me that the receipts were compiled from the cash register tapes at the end of the day. That is cash business, that he carried no receivables on the books, so that the receipts would be reflected on the cash register tapes.

(Testimony of Seth L. Root.)

Q. There were no receivables, so that the receipts were reflected daily from the cash register?

A. Yes.

Q. State if you know who made the daily entries from the cash register?

A. Well, I assume that he furnished the information to or furnished the tapes to the girl who would do the posting. [184]

Mr. Lewis: I would like to ask to strike that last answer—he “assumed.” Let him state if he knows how it was handled.

The Court: We might take the noon adjournment, ladies and gentlemen, and we will resume at 2:30 this afternoon. The same admonition to you.

(Thereupon a recess was taken to the hour of 2:30 p.m. this date.) [185]

September 18, 1952, 2:30 P.M.

SETH L. ROOT

resumed the stand, and having been previously duly sworn, testified further as follows:

Mr. Drewes: If your Honor please, I believe that a question had been asked and an objection interposed. I will withdraw the question.

Q. (By Mr. Drewes): Mr. Root, state, if you know, who in the Army-Navy Store took the daily readings from the cash registers?

A. Mr. Olender.

Q. In the course of your conversations with Mr. Olender concerning the operation and management

(Testimony of Seth L. Root.)

of his store, were you at any time referred to any other person for answers to any questions that you might ask? A. No.

Q. Did you, Mr. Root, ask Mr. Olender, or any representative of his, for a comparative net worth statement?

A. Will you restate? I don't follow you.

Q. Did you ask the defendant or anyone representing him for a comparative net worth statement?

A. I asked Mr. Olender for a comparative net worth statement, yes.

Q. And why did you ask him for such a statement? [186]

A. Well, I had these large cash transactions as revealed by these P. C. R.'s.

Q. You are referring to the Government's Exhibits No. 30 to 33 that have been previously mentioned?

A. Yes, those ones that I had here this morning that you handed to me. In addition, I had these Goodman transactions which involved a series of cashier's checks.

Mr. Lewis: Your Honor, I would like to have that stricken from the record because Goodman transactions were in 1944, not the years in this indictment.

Mr. Drewes: I will withdraw the question, your Honor.

The Witness: May I state something in here?

Mr. Drewes: The question has been withdrawn.

Q. (By Mr. Drewes): You knew, did you not,

(Testimony of Seth L. Root.)

Mr. Root, that the defendant's books in the Army-Navy Store were not complete? A. Yes.

Q. How did you know that they were not complete?

A. Because the Goodman transactions were not reflected on the books.

Mr. Lewis: Your Honor, again I ask that that be stricken from the record because the Goodman transaction admittedly occurred in 1944, a year previous to the indictment.

Mr. Drewes: I think the purpose for which the question [187] was asked, your Honor, that is immaterial. The question was as to the status.

The Court: The motion is denied. It may remain.

Q. (By Mr. Drewes): Mr. Root, you asked for a joint investigation with the special intelligence unit in this matter?

A. Subsequent to receiving Mr. Olender's net worth statements, yes.

Q. And from that time on Mr. Whiteside worked with you in the investigation of this case?

A. Yes, under our regulations Mr. Whiteside is in charge of the investigation and I am just a co-worker.

Q. And state, if you recall, Mr. Root, when you finally made your report in this matter?

A. My report as I recall went in in 1949. I am not certain as to the exact date on that.

Q. Early or late in the year, or do you recall?

A. I believe it was early in the year.

(Testimony of Seth L. Root.)

Q. Mr. Root, did you compare the books of the Army-Navy Store with the taxpayer's returns for the years 1945 and '46? A. Yes, I did.

Q. And what was the result of that comparison?

A. They were in substantial agreement.

Q. They were in substantial agreement?

A. Yes. [188]

Q. During the course of your investigation did you expand your investigation to include years other than 1945 and '46?

A. Yes, I included some earlier years because I thought it was necessary to get the full picture.

Q. How far back did you go?

A. To January 1st, 1942.

Q. Did you compare the books of the Army-Navy Store with the taxpayer's returns for those years?

Mr. Lewis: Your Honor, I object to that question.

The Court: Sustained.

Mr. Drewes: Your Honor, I ask you to reconsider for just a moment. You will recall that the taxpayer's return for early years were offered and admitted in evidence for the purpose of supporting the base year.

The Court: What is the base year?

Mr. Drewes: 1944.

The Court: 1944 is the base year. What relevancy would there be as to prior years?

Mr. Drewes: The taxpayer has submitted a net

(Testimony of Seth L. Root.)

worth return for the year 1941 and we want to support the 1944 base by referring back.

The Court: Yes, I remember you stated that the base year was 1944 and then there was coordination or correlation between the earlier years. [189]

Mr. Drewes: To support the accuracy of the 1944 base year we want to offer the taxpayer's return, and did offer them and they were accepted for 1941 to '44.

The Court: All right, without showing I will revise my ruling.

Mr. Lewis: I will still enter an exception on the ruling on the grounds that if it should go into evidence at all, it should be as a matter of rebuttal and when the taxpayer presents his case which might bring forth matters involving 1942, 3 and 4.

The Court: Well, not necessarily. Without extending any discussion on the matter the base period must be further made out by the Government as part of its case, and upon that showing and upon the representation of counsel for the Government I will allow reference made to the earlier returns, and for that limited purpose.

Mr. Lewis: May the exception be noted for the record?

The Court: Yes.

Q. (By Mr. Drewes): Did you compare the books of the taxpayer for the earlier years with the earlier returns?

A. To the extent that they were available. I think the earliest book that was presented to me

(Testimony of Seth L. Root.)

began May 13th of 1943 in which, in the general ledger balances presumably from preceding books were entered there.

Q. As to the years 1943 and '44 were they in substantial [190] accord with the taxpayer's return?

A. Yes, they were.

Mr. Drewes: I have no further questions.

Cross-Examination

By Mr. Lewis:

Q. Mr. Root, in the examination of the books of the taxpayer did you find any errors in the years 1945-1946? A. No.

Mr. Lewis: You didn't? Your Honor, that will be all the questions of Mr. Root. Would he remain available in case we want to call him?

The Court: The witness is available.

Redirect Examination

By Mr. Drewes:

Q. Mr. Root, in connection with your last response to the last question asked of you, did you mean by your testimony that there were no omissions from the books of the taxpayer? A. No.

Mr. Lewis: Your Honor, I object to that question as leading and suggestive.

The Court: Sustained. The answer may be stricken.

Q. (By Mr. Drewes): You have testified that there were no errors found by you on the books of

(Testimony of Seth L. Root.)

the taxpayer for the years 1945-1946. Do you wish to explain your answer in any way? [191]

A. Except that the books and records as they were presented were in agreement with the tax returns. There were no records in the books themselves. Any errors that were made were from things that weren't on the books.

Q. You mean any errors were errors of omission?
A. Errors of omission.

Recross-Examination

By Mr. Lewis:

Q. Mr. Root, what were the errors and omissions in the books?

Mr. Drewes: If I may object, I haven't finished questioning this witness.

Mr. Lewis: Pardon me.

Redirect Examination

(Continued)

By Mr. Drewes:

Q. Mr. Root, I will show you the Government's Exhibits Nos. 34 and 35 which you will recall are two checks, each in the amount of \$2500 which have heretofore been introduced into evidence and which have been identified by the witness Leavy as sums received by him from the sales of suits belonging to Mr. Olender, and which were turned over to Mr. Olender. Do you know of your own knowledge where and how those two checks appear on the books of the taxpayer?

(Testimony of Seth L. Root.)

A. These checks appear as a credit to his capital account.

Q. And——

A. As a contribution of capital from the taxpayer. [192]

Q. How long have you been engaged in accounting work, Mr. Root? A. Since 1946.

Q. And you have been employed by the Bureau of Internal Revenue since that time?

A. Yes.

Q. You have made a number of audits and examined a great number of accounting books and records in the course of that work?

A. Yes.

Q. Based on your background? A. Yes.

Q. Based on your background and experience over that period of time would you say that the credit to the capital account is a proper way to handle receipt from sales?

A. No, sir, I wouldn't.

Mr. Hagerty: I object to that, your Honor, as no proper foundation. He isn't a certified public accountant or anything.

Mr. Drewes: I think he has had ample background.

The Court: I assume the jurors have the same difficulty I have in hearing. We have a problem. It is impossible to do any work with that noise. I am at a loss to find a solution unless the Marshal could ask these men to refrain for the balance of the afternoon until four o'clock. We might [193]

(Testimony of Seth L. Root.)

then recess until two tomorrow afternoon and that will give an interval of time to clean up that street. It is impossible to try a case under these conditions. This is an important case to the Government as well as the defendant as all criminal cases are and under the circumstances I feel that in the interests of justice we should have some definite course of conduct. Mr. Clerk, will you do this for me? Ask the Marshal to request these people to refrain from working until four o'clock today. We will resume tomorrow afternoon at two o'clock. That will give them some time. Maybe they can put a night shift on. They have to do their work, too. We will take a five or ten minute recess with the same admonition, ladies and gentlemen.

(Short recess.)

Mr. Drewes: If your Honor please, the witness advised me during the recess that he had misunderstood the question that was put to him by counsel. I had asked him, the record will show, whether or not the books of the defendant were in substantial agreement with the tax returns filed, and when Mr. Lewis asked him whether or not he found any errors in the books he understood Mr. Lewis to refer to my question as to whether or not the tax returns and the books were in agreement, is that correct?

Mr. Lewis: Your Honor, I think that is a matter of argument. [194]

The Court: I think so. I think that the witness

(Testimony of Seth L. Root.)

is entitled to make any explanations he desires in the light of any questions you pose to him, but the question and the answer as originally submitted may stand in the record. Mr. Lewis asked him a question and he is entitled to make an explanation if he so desires, and counsel may examine him on any explanation. Or if you wish to make an explanation, Mr. Witness, but otherwise the record will stand as is.

Mr. Drewes: Very well, your Honor. Then may I re-put the question to the witness?

Q. (By Mr. Drewes): Mr. Root, do you wish to explain your answer to Mr. Lewis' question?

A. Yes. I understood Mr. Lewis' question to follow in the line of your question, whether the books and records were in agreement with the return, and he put it from the opposite point, from the negative standpoint, were there any errors.

Mr. Hagerty: I will object to that as not being responsive, your Honor.

The Court: The objection is overruled.

Mr. Drewes: I have no further questions, your Honor.

Mr. Lewis: Your Honor, I have the books of Mr. Olender's business, and a chart that we have prepared during the noon hour showing what the books show, and all of the Goodman transaction evidenced at this morning's hearing. I would suggest that in cross-examination of Mr. Root, that he have [195] an opportunity—and they could put on their next witness—Mr. Root is not in very good

health—to examine these books and this chart and see if he agrees with us.

The Court: That may facilitate his examination. You might do that, Mr. Root, please.

Mr. Lewis: And they can proceed with the next witness.

MELBOURNE C. WHITESIDE

called as a witness on behalf of the Government, sworn.

The Clerk: Would you state your name, your address and your official capacity to the Court and to the Jury?

The Witness: Melbourne C. Whiteside. My address is 32 Lindberg Street, San Mateo, California. I am a special agent in the Intelligence Division of the Internal Revenue.

Direct Examination

By Mr. Drewes:

Q. Mr. Whiteside, how long have you been an employee of the Treasury Department?

A. Eighteen years.

Q. How long have you been a special agent, Intelligence Unit? A. Past four years.

Q. Were you a revenue agent before that?

A. Yes, I was a revenue agent approximately eight years prior to that. [196]

Q. Are you a licensed public accountant, Mr. Whiteside? A. Yes, sir.

Q. Mr. Whiteside, I show you the Government's Exhibits No. 24 and No. 25 for identification which

(Testimony of Melbourne C. Whiteside.)

have been identified as net worth statements furnished by the taxpayer showing his net worth as of the 31st day of December, 1941, and the last day of December, 1947, and the supporting papers, or the papers in support thereof which were furnished by the taxpayer at the request of the Government. Did you conduct an examination after the exhibits which you have before you were received by the Government?

A. My original assignment to this case was made as a result of the request from the revenue agents for a joint investigation. I believe that request was received in our office on October 7, 1948, and I was assigned to the case on October 12th. This exhibit is dated September 13th, so my investigation started subsequent to the submission of this.

Q. Did you, however, examine and conduct an investigation of the data which is shown on the exhibits which you have before you?

A. Yes, sir, that is correct. After we started our investigation our first step was to verify the items contained in this net worth statement.

Q. Will you explain the nature and scope of that investigation and verification? [197]

A. Well, we went down these items one by one. If they were bank accounts we would go to the banks to verify the amounts as shown on these statements. The statement as submitted is as of December 31, 1941, and December 31, 1947. In our investigation we got balances to break it down year by year as we verified the items.

(Testimony of Melbourne C. Whiteside.)

Q. Did you examine escrow records of title insurance companies? A. Yes, sir.

Q. Bank accounts?

A. We examined bank accounts, escrow records, grantee-grantor records at the county recorder's offices and various other accounts.

Q. As a result of your work did you find any omissions from the net worth statement as tendered by the taxpayer?

A. Yes, we found that the taxpayer had omitted \$5,000 worth of Asturias stock from the net worth statement, and also a savings account of Mrs. Olender had not been included.

Q. How did you locate the savings account of Mrs. Olender, Mr. Whiteside?

A. Mr. Root had these T.C.R. reports and one of those was as a result of cashier's check being purchased by Mr. Olender for cash. The cashier's check was deposited in Mrs. Olender's bank account.

Q. Will you tell me, Mr. Whiteside, to which of the T.C.R.'s [198] you referred, Government Exhibits 30 through 33?

A. It is none of these, sir.

Q. Possibly I overlooked one.

A. Oh, I am sorry, here it is. It is Exhibit No. 33.

Q. That is the Exhibit which shows the purchase of cashier's check in the amount of \$3,000 with \$1,000 bills? A. That is correct.

Q. And you traced that cashier's check into a savings account, you say?

(Testimony of Melbourne C. Whiteside.)

A. Into the savings account of Mrs. Olender.

Q. In what bank?

A. That was the Bank of America, main office, 12th and Broadway, Oakland.

Q. What was the balance of that account, if you recall, at the time?

A. The balance at the end of 1946 was \$10,000 plus—I think \$10,070, or something like that. It was \$10,000 deposit plus interest accrued.

Q. And you referred to the investment in Asturias Company. How did you locate the second investment in that concern?

A. Well, we located the records of the Asturias Company itself and went and looked to see how this stock was purchased, and in verifying that we found that there was an additional \$5,000 invested.

Q. Beyond the one that was shown in the taxpayer's return? [199]

A. That is correct.

Q. Do you know, Mr. Whiteside, whether the omitted investment in the Asturias corporation was the first or the second of the two investments which have been put into the record in this trial, that is, the July investment or the December investment?

A. It was the July investment, July 17th I believe.

Q. Mr. Whiteside, you heard testimony this morning of Mr. Leavy and you recall Government's Exhibits Nos. 34 and 35 admitted in evidence were identified by him as proceeds of sale to one Lerman on behalf of Olender, and that the proceeds were given by him to Mr. Olender. Did you find an entry

(Testimony of Melbourne C. Whiteside.)

on the books of the taxpayer in the amount of \$5,000 reflected by those two checks?

A. Yes, we found that these checks had been credited to Mr. Olender's capital account as an additional investment.

Q. How did you determine, Mr. Whiteside, that that capital—that that credit to the capital account was in effect a sale?

A. Well, we were interested in any contributions to his capital account, so through the deposit tag at the bank we found that the deposit was a cashier's check from the American Trust Company, main office, Oakland. We traced the cashier's check to the purchaser of the cashier's check at the American Trust and found that they had been purchased by Mr. Lerman [200] and that they were payable to Lewis Leavy. We inspected the checks at that time. We talked to Mr. Lerman. He stated that he had purchased these sailor suits from Mr. Leavy and was unaware at that time that Mr. Olender had anything to do with them. We later talked to Mr. Leavy, and he told us that they were Mr. Olender's suits and that he had sold them for Mr. Olender.

Q. I show you, Mr. Whiteside, the Government's Exhibit No. 42 which is a check payable to Lewis Leavy in the amount of \$7724 drawn by Mr. Saraga who testified this morning and endorsed by the payee Lewis Leavy and Milton Olender. In the course of your investigation in this case, Mr. Whiteside, did you look for that receipt on Mr. Olender's books?

A. Yes, we did.

(Testimony of Melbourne C. Whiteside.)

Q. That is on the books of the Army & Navy Store?

A. This particular check is not recorded on the books of the Army-Navy Store. The check itself was deposited in Mr. Olender's personal bank account.

Q. His personal bank account?

A. Yes, sir.

Q. Mr. Whiteside, did you have occasion to ask the defendant or anyone representing him for his cancelled checks, his personal cancelled checks for the years 1945 and 1946?

A. I asked Mr. Ringo. I was not permitted to talk to Mr. [201] Olender after the first week of the investigation.

Mr. Lewis: Your Honor, I ask that that be stricken. It is not responsive at all.

The Court: The motion is denied.

Q. (By Mr. Drewes): You asked Mr. Ringo for those checks? A. That is correct.

Q. And did you receive them?

A. We received the checks for 1946, and there were certain checks for 1945 which were brought out, but they were not all produced.

Q. In other words, you got all of the 1946 checks and some of the '45? A. And some of the '45.

Q. You testified, Mr. Whiteside, to the best of your recollection there was a balance of something over \$10,000 in Mrs. Olender's account in 1946, at the time of your investigation. State, if you can recall, the balance in that account as of the 31st day of

(Testimony of Melbourne C. Whiteside.)

December, 1947, which, of course, is the date of the taxpayer's net worth for that year.

A. No, that is not included in this. There was a withdrawal during 1947, to the best of my recollection, of around six thousand some odd dollars.

Q. As of the last day of 1947?

A. That is correct. [202]

Q. In the neighborhood of \$6,000?

A. \$6,000 plus.

Q. With respect to the Lerman transaction which you have testified were entered in the books of the Army-Navy Store as a capital contribution, did they appear in the books in any other form? In other words, could it have been a duplicate entry?

A. No, there couldn't have been a duplicate entry in that type of books that he kept. It was a credit to the capital account.

Q. And the \$5,000 item represented the proceeds—representing the proceeds from that sale did not appear in the books of the taxpayer in any other form or any other place? A. No, sir.

Mr. Drewes: I have no further questions.

Cross-Examination

By Mr. Lewis:

Q. Mr. Whiteside, didn't that \$5000 item come from cashier's checks procured in January, 1944, on what is known as the Goodman transactions?

A. Repeat that question.

Q. Didn't the \$5,000 come from cashier's checks that were taken, bought for cash in January, 1944?

(Testimony of Melbourne C. Whiteside.)

In other words, was there not \$20,500 worth of cashier's checks purchased for cash in January, 1944, by Mr. Olender? Do you remember that item? The so-called Goodman checks? [203]

A. The Goodman checks? That was investigated by Mr. Blanchard. I personally did not see these checks at the bank, the Goodman checks themselves.

Q. Then you do not know anything about those checks?

A. The Goodman checks or the \$5,000 from Mr. Lerman?

Q. We will start out with the cashier's checks totalling \$20,500 purchased for cash January, 1944.

Mr. Drewes: I would like to object to starting out there. There was nothing said on direct examination about the Goodman transaction except for the limited purpose of supporting the starting point.

The Court: The objection is overruled. [204]

The Witness: I am sorry, I—

Q. (By Mr. Lewis): I say, didn't Mr. Olender purchase \$20,500 worth of cashier's checks with cash in January, 1944, set forth in that Exhibit as the Goodman checks?

A. I did not check that particular item, Mr. Lewis. That is, I did not go to the bank. I relied upon the investigation of Mr. Blanchard and Mr. Root.

Q. Now, you have stated, however, that \$5,000 out of the Lerman sale was deposited in the store

(Testimony of Melbourne C. Whiteside.)

bank account and credited to Milton Olender's capital account on the books of the store, didn't you?

A. Yes, sir.

Q. Now, if the start of that \$5,000, if that \$5,000 actually was out of the personal funds of Mr. Olender, wouldn't that be the correct bookkeeping procedure when he put that \$5,000 into the store account to credit his investment account?

A. There is no indication that that \$5,000 was a part of the \$20,000 at all.

Q. If it was a part of it wouldn't that be the correct way to handle it?

A. No, it wouldn't be good bookkeeping.

Q. It wouldn't? A. No, sir.

Q. In other words, if you put \$5,000 that is not in the store [205] to that account and not included in your inventory in the store but you deposit \$5,000 to the store account you wouldn't put it in the investment account?

A. The original checks in the instance which you cite should have been recorded in the books, then it would not have been necessary to put anything back in the investment account. It would have been a straight purchase and sale.

Q. But if it was not in the inventory and never put into the inventory previous to this time, and was sold and put in the store account, wouldn't it go into the investment account?

A. Well, if he is reinvesting money, it would go to the investment account, yes, sir.

Q. Didn't you get all the store checks for the

(Testimony of Melbourne C. Whiteside.)

year 1945 during the course of your investigation?

A. I said we didn't get all the personal checks—all the personal commercial account checks for 1945.

Q. But you did get all the store checks?

A. To the best of my recollection I believe we did.

Q. Did you ever make an examination as to the value of the Asturias Import Export Corporation stock?

A. No, sir.

Q. Haven't you got a section in the Bureau of Internal Revenue that determines the worth of stocks and once it is [206] determined that way you keep a record of it?

A. I believe there is a section in the office of the internal revenue agent which makes determinations on the values of securities at any given date.

Q. Tomorrow morning can you bring me in that record, or tomorrow afternoon at two o'clock of the internal revenue agent's office on the Asturias Stock.

A. I will attempt to get it. I don't know who has charge of that, but I will attempt to.

Q. If you can't get the actual record just read it for me.

A. All right, sir.

Q. Now, you say your investigation in this matter started on what date?

A. October 12, 1948.

Q. That was the day you started individually?

A. That is the date it was assigned to me, yes, sir.

(Testimony of Melbourne C. Whiteside.)

Q. What date did Mr. Blanchard of your office start?

A. Mr. Blanchard was never assigned to the Olender case.

Q. Well, he was over asking Mr. Olender questions, wasn't he?

A. He was asking him questions on another matter.

Q. Oh, I see. In the course of your investigation did you talk to Mr. Olender's sister-in-law?

A. I beg pardon—sister-in-law?

Q. Yes, Mr. Olender's sister-in-law. [207]

A. What was her name?

Q. Mrs. Widrin.

Mr. Drewes: Objected to as improper cross-examination.

The Court: Objection overruled.

A. Yes, I talked to Mrs. Widrin.

Mr. Lewis: That is all.

Redirect Examination

By Mr. Drewes:

Q. Mr. Whiteside, I show you the Government's Exhibits Numbers 36 and 37 heretofore admitted in evidence which are registered—consist of two sheets from the register of cashier's checks issued from the American Trust Company, and I also show you two checks payable to the American Trust Company each drawn by Mr. Lerman, one number 6395 dated May 15, 1945, and one number 6393 dated May 14,

(Testimony of Melbourne C. Whiteside.)

1945. Now, you testified, Mr. Whiteside, that you found that the \$5,000 credit to the capital account consisted of a receipt for cashier's check at the American Trust Company and that you had then determined that cashier's check was purchased at the American Trust Company by Mr. Lerman?

A. That is correct.

Q. Are those two checks which are before you the checks of Mr. Lerman to which you referred?

A. That is correct.

Q. And do the Government's Exhibits Numbers 36 and 37 reflect [208] that the cashier's checks which are the Government's Exhibits numbers 34 and 35 were purchased at the American Trust Company by Mr. Lerman tendering the two checks which you have before you?

A. Well, on check number 6395 there is written on the back of it C.C. number 7146 which is the number of the cashier's check purchased. Mr. Lerman himself told us that that was the purpose of these checks, and we verified that at the bank. I mean, this cashier's check register shows the purchase of cashier's checks on the dates of these. [209]

Q. The cashier's check register shows that those two checks dated in May of 1925, drawn by Mr. Lerman, was used to purchase the two cashier's checks which have heretofore been put in evidence?

A. That's correct.

Mr. Drewes: At this time, your Honor, the Government will offer into evidence two checks drawn on the American Trust Company, each

(Testimony of Melbourne C. Whiteside.)

drawn by Mr. Lerman, each in the amount of \$2,500, one dated May 14th, one dated May 15th, 1945.

The Court: They may be marked.

The Clerk: U. S. Exhibits 33 and 34 in evidence.

(Thereupon checks referred to were marked U. S. Exhibits Nos. 33 and 34 in evidence.)

Mr. Drewes: I have no further questions.

Cross-Examination

By Mr. Lewis:

Q. Mr. Whiteside, I hand you that stipulation. You in one of your conferences wrote it up.

A. Yes, I have seen it.

Q. Are you familiar with it?

A. Yes, I am familiar with it.

Q. Now in the stipulated assets there, I do not think we have any stipulation of fact that he had that amount of assets and liabilities. In your examination did you find any evidence of any other assets that Mr. Olender had [210] on December 31, 1944, that are not included in that stipulation?

Mr. Drewes: I assume your question excludes the items expressly excluded by the stipulation?

Mr. Lewis: That's right.

Mr. Drewes: And also the items to which evidence has heretofore been introduced?

Mr. Lewis: That's right.

A. We found evidence of some "personal posses-

(Testimony of Melbourne C. Whiteside.)

sions which are not included in here and which are not included in the other evidence heretofore submitted.

Q. (By Mr. Lewis): Did you find any evidence of very substantial sums of cash on hand not included in the stipulation during the year 1944?

A. The only evidence or indication that the taxpayer had any cash on hand would have been contained in this net worth statement as submitted by him.

Q. Did you ever talk to Mr. Monroe Friedman about the cash on hand during 1944?

A. No, sir.

Q. Did you ever see Mr. Friedman's affidavit?

A. I saw an affidavit by Mr. Friedman, yes.

Q. In none of your computations in this case did you take into consideration the amount of cash set forth in Mr. Friedman's affidavit? [211]

A. Yes, sir, I did.

Q. Can you point out to me where you did?

A. Not in this. Not in the stipulation. But in computing the deficiency as shown by the indictment, the cash on hand was allowed as claimed by the taxpayer. We got that information through Mr. Ringo.

Q. I mean information given to you by Mr. Monroe Friedman.

A. Mr. Monroe Friedman gave me no information directly.

Q. Well, you had his affidavit available, did you not?
A. I had his affidavit, yes, sir.

(Testimony of Melbourne C. Whiteside.)

Q. But you did not consider that amount of cash?

A. Mr. Olender gave to Mr. Ringo a statement showing the cash on hand as of the beginning of this period and how it was disposed.

Mr. Lewis: I ask that be stricken, your Honor. I want to know if he considered the amount of cash Mr. Monroe Friedman gave him, gave the department in the affidavit, as on hand as of May 5, 1944.

The Court: You may answer.

A. I think it's the same cash. We used Mr. Olender's figures, knowing that he would be more familiar than Mr. Friedman.

Q. (By Mr. Lewis): Did Mr. Friedman testify he counted that money himself?

A. Not to me he didn't.

Mr. Drewes: May he answer and then explain his answer, [212] your Honor?

The Court: Yes.

A. I think that Mr. Friedman did say in his affidavit that he had counted the money.

Q. (By Mr. Lewis): That's right. But you did not consider that amount?

A. I considered the taxpayer's explanation.

Q. You never got the explanation from the taxpayer, did you? You got it from Mr. Ringo?

A. Through Mr. Ringo.

Q. And Mr. Ringo, you heard him testify here the other day, that that was a preliminary estimate?

A. Mr. Ringo outlined a series of questions for Mr. Olender. Among them was how the cash was

(Testimony of Melbourne C. Whiteside.)

disposed of. And Mr. Olender answered in his own handwriting showing the cash disposed from the vault as of the beginning—as of the end of '44, I believe it was \$50,000 left; at the end of '46 there was no cash left. He had disposed of it all.

Q. But you wouldn't take the testimony of the man who had actually counted the money on two occasions?

A. I think the man who owns the money is in a better position to know what he has.

Q. Than the man who counted it?

A. I think Mr. Olender counted it. [213]

Mr. Lewis: That is all.

Mr. Drewes: Are you through?

Mr. Lewis: Yes.

Redirect Examination

By Mr. Drewes:

Q. Mr. Whiteside, do you recall offhand the date of the affidavit of Monroe Friedman referred to by counsel?

A. No, I don't. I recall that there was such an affidavit but I don't recall the date.

Q. I show you this document and ask you if your recollection is refreshed as to the approximate date of the affidavit? A. Yes, sir.

Q. What is the date?

A. September 13, 1948.

Q. Do you recall the date when the affiant ex-

(Testimony of Melbourne C. Whiteside.)

amined the vault, the cash in the vault of the taxpayer?

A. He states that on—in April of 1944 that they—April 22, to be exact—he met Mr. Olender at the Bank of America.

Q. Mr. Whiteside, in response to question asked you by counsel you stated that Mr. Ringo had propounded questions to the defendant, one of which—the response to one of which set forth the amount of cash that the defendant had had in his bank vault at certain dates, is that correct?

A. That's correct. [214]

Q. And was that shown to you by Mr. Ringo?

A. That is correct.

Q. I will show you, Mr. Whiteside, a photostatic copy of a document and I will ask you if that is a copy of the statement, in questions and answers, that was shown to you by Mr. Ringo and to which you have referred in your testimony?

A. Yes, sir, that is the statement.

Q. Do you know where the original is?

A. No, I do not.

Q. Was the original ever given to you?

A. It was loaned to me but Mr. Ringo took it back and—

Q. You gave it back to Mr. Ringo?

A. That is correct.

Mr. Drewes: If your Honor please, the Government will offer the photostatic copy of the identified document into evidence, limited strictly to the item

(Testimony of Melbourne C. Whiteside.)

referred to as item 19, "Analysis of use of cash in Vault."

Mr. Lewis: Your Honor, I object to that document going into evidence. He has identified it as coming from Mr. Ringo. He has not identified any part of that document as coming from Mr. Olender.

Mr. Drewes: If your Honor will recall, Mr. Ringo testified that in computing the net worth statements for the defendant he propounded to the defendant a number [215] of questions and that the defendant himself furnished the information. Now counsel has brought up the subject on cross-examination on the Government's case in chief. I think that the original has been accounted for. I think Mr. Ringo's statement identifies it, and Mr. Whiteside's further reference to it further identifies it as being the source of information upon which he calculated the amount of cash in vault which the defendant had on the appropriate dates. Now, Mr. Lewis has challenged that and it is entirely appropriate that the Government be entitled to introduce that document in rebuttal.

The Court: This document is in the handwriting—

Mr. Drewes: It is Mr. Olender's, according to Mr. Ringo's testimony. That is, the answers are. The questions are in Mr. Ringo's handwriting.

Mr. Lewis: Your Honor, a further objection to it, it is a confidential communication. We note our objection to all of this testimony.

(Testimony of Melbourne C. Whiteside.)

The Court: The objection is overruled and the offer is limited to the purposes indicated.

Mr. Drewes: Section 19, "Cash in Vault"—

Mr. Lewis: Your Honor, if it goes in, it should be permitted to go in in its entirety.

Mr. Drewes: I have no interest in introducing into evidence information furnished by the defendant beyond the [216] purpose for which it is offered by the Government.

The Court: At the appropriate time you may make your offer.

Mr. Hagerty: If your Honor please, it is in the nature of a letter, if part of the memorandum goes in, the whole memorandum goes in.

Mr. Drewes: They may offer it at the appropriate time if they so desire. It is offered for the one purpose.

Mr. Hagerty: And a further defect, your Honor, that it is purely hearsay, that is a hearsay document, and it has not been identified by the original writer, Mr. Ringo.

The Court: Overruled.

Mr. Lewis: Exception.

The Court: It may be marked.

The Clerk: U. S. Exhibit Number 45 in evidence, with a certain limitation.

(Thereupon handwritten document consisting of questions 15 through 22 received in evidence and marked U. S. Exhibit Number 45.)

Mr. Drewes: With the Court's permission I shall

(Testimony of Melbourne C. Whiteside.)

read item Number 19 to the jury.

Mr. Lewis: Would the reporter please note the exception?

Mr. Drewes: This document is all in individual handwriting—not all, not all in the handwriting of the same [217] person. Item Number 19 is entitled, “Analysis of use of Cash in Vault.” The first item is, “Decrease in 1944, \$6,000.

“Decrease in 1944 (Goodman deal 20550), \$19,000.

“Decrease in 1945, \$42,800.

“Decrease in 1946, \$7,200.

“Total, \$75,000.”

Mr. Drewes: I have no further questions.

Mr. Lewis: No further questions.

Mr. Drewes: That is all, Mr. Whiteside.

(Witness excused.)

The Court: Now, are there any questions that you have?

Mr. Hagerty: No questions.

Mr. Lewis: No.

Mr. Drewes: I believe Mr. Root is on cross-examination.

Mr. Lewis: I don't know whether he is through or not.

Mr. Drewes: Your Honor, Mr. Lewis has handed a number of documents to Mr. Root with the suggestion that if Mr. Root studied them it might accelerate the matter. I haven't had an opportunity to look at them and I am not entirely sure that that is the proper procedure. At least from the prosecu-

(Testimony of Melbourne C. Whiteside.)

tion's point of view. I might suggest that we recess at this time and I will have an opportunity then to look at these documents and discuss with Mr. Lewis to see to what extent we can agree. It may be time will be [218] saved in the long run.

The Court: I have no objection.

Mr. Drewes: Is that satisfactory?

Mr. Lewis: That is satisfactory.

The Court: Any other matters you may have might be the subject of discussion, accounting matters.

Mr. Drewes: Yes, your Honor.

The Court: You have between now and tomorrow afternoon at two o'clock.

Mr. Drewes: Two o'clock.

The Court: Two o'clock tomorrow afternoon. Ladies and gentlemen we will adjourn this case until tomorrow afternoon at two o'clock, and would you advise the Marshal, Mr. Magee, that we are adjourning until two o'clock in order to provide an interval wherein they might finish that work. The same admonition, ladies and gentlemen, not to discuss the case under any circumstances or conditions, not to form an opinion in the matter until the matter is submitted to you. I think I also advised you at the outset not to read news accounts of this trial, and if I failed to so advise you or admonish you, I may at this time indicate to you that you should not read any news accounts, current accounts of the reporting of the trial. We will adjourn then until tomorrow at two o'clock.

(Whereupon an adjournment was taken until two o'clock p.m., Friday, September 19, 1952.) [219]

Afternoon Session

The Clerk: United States versus Olender on trial.

Mr. Lewis: Mr. Whiteside.

Mr. Drewes: Mr. Lewis, may I ask one further question on direct before you take over the cross-examination?

Mr. Lewis: Yes.

MELBOURNE C. WHITESIDE

called as a witness on behalf of the Government, resumed the stand, previously sworn.

Further Redirect Examination

By Mr. Drewes:

Q. Mr. Whiteside, I show you the Government Exhibit No. 45 which has heretofore been admitted into evidence and ask you to state, if you can, who made the photostatic copy of the original document that represents?

A. Well, after Mr. Ringo gave me the originals, I took them to our photostat room and had the operator make them.

Q. You were there at the time, is that correct?

A. That's correct.

Mr. Drewes: That is all.

(Testimony of Melbourne C. Whiteside.)

Recross-Examination

By Mr. Lewis:

Q. Mr. Whiteside, did you have the opportunity of securing the file Asturias stock from the Securities Division? A. Yes, I did.

Q. Have you that with you? [220]

A. I have a copy of the report, yes, sir.

Q. This is the report of the Securities Division, the Internal Revenue agent's office?

A. That is what it is purported to be, yes, sir.

Q. Well, is it?

A. As far as I know it is. I obtained it from the Internal Revenue agent's office.

Mr. Lewis: Your Honor, I would like to read part of this report into the record.

“The stock and stockholders’——”

Mr. Drewes: Object, your Honor, to reading the document unless it is put into evidence.

Mr. Lewis: I am going to put it into evidence.

The Court: Well, you better make your offer. Is it, the reading, very extensive?

Mr. Lewis: No, just one paragraph.

The Court: All right.

Mr. Lewis: (Reading):

“San Francisco 5, California, October 19, 1951. Stock and stockholders' loans are deemed to have become worthless in the year 1947, according to the attached copy of the information report dated November the 28th, 1950, prepared by M. E. Seaback, Internal Revenue agent.”

(Testimony of Melbourne C. Whiteside.)

Your Honor, I would like to introduce this into evidence [221] as Defendant's Exhibit 1.

Mr. Drewes: No objection.

The Court: It may be introduced and marked in evidence.

The Clerk: Defendant's Exhibit A in evidence.

(Thereupon the document hereinabove referred to was introduced and marked Defendant's Exhibit A in evidence.)

Q. (By Mr. Lewis): Now, Mr. Whiteside, you spent considerable time in 1948 and '9, I think you said, probably '50, investigating the affairs of the Defendant, Milton Olender. Did you find any evidence of any other business activity the defendant was engaged in other than the operation of the Army and Navy stores during the years '45 and '46?

A. He was a member of some partnerships in which some property was involved—Fresno property.

Q. Was he engaged in any business activity which was not reported on his income tax returns?

A. He sold sailor suits which were not reported on his income tax return.

Q. Did you find any others, outside of those that have been admitted into evidence here, that were not reported?

A. We had some other suspected sales we were not able to——

Mr. Lewis: I move that be stricken out, your Honor. It is not responsive.

(Testimony of Melbourne C. Whiteside.)

The Court: Yes.

Mr. Lewis: "Suspected." [222]

The Court: That may go out.

A. None that we could definitely prove.

Q. (By Mr. Lewis): None that you could prove at all? A. That we could definitely prove.

Q. Except those of the business activities that were reported on the returns?

A. With the exception of the ones that are in evidence.

Mr. Lewis: That is all.

Further Redirect Examination

By Mr. Drewes:

Q. You testified, Mr. Whiteside, that Mr. Olender was engaged in partnership activity in connection with the operation of the Riverdale Ranch in Fresno? A. That is correct.

Q. That ranch was sold, was it not?

A. That is correct, it was sold in 1946, I believe.

Q. The partnership return reflects that sale, do you recall?

Mr. Lewis: I object, your Honor, the return is in evidence.

Mr. Drewes: Withdraw the question.

Q. Did the sale of that property result in capital gain to the partnership; state if you know?

A. Yes, it did.

Q. And was that gain reported by the taxpayer in the year 1946? A. It was not. [223]

(Testimony of Melbourne C. Whiteside.)

Mr. Lewis: I object, your Honor. The return is in evidence and it will show itself whether or not that gain was reported.

The Court: You might refer to the return—you might refer the return to the witness.

Mr. Drewes: I will withdraw the question.

Q. I will show you the Government Exhibits Nos. 2 and 4 which are the individual income tax returns for the year 1946, heretofore marked in evidence, the individual returns being those of Mr. Olender and his wife, Betty Olender, and ask you if the capital gain realized from the sale of the Riverdale Ranch appears on either of those returns? A. No, sir, it does not.

Mr. Drewes: That is all, Mr. Whiteside.

Mr. Lewis: What is the partnership return?

Mr. Shelton: I think it No. 10, Mr. Lewis.

Further Recross-Examination

By Mr. Lewis:

Q. Mr. Whiteside, I am showing you Government's Exhibit No. 20, partnership return of Olender, Hamilton, Kaplan and Gambor. Does it show the sale of the Riverdale Ranch?

A. No, sir, this does not show the sale.

Q. Does it not show the sale of the Riverdale Ranch?

A. It shows a business loss from the operation.

Q. Loss on sale—what is that—Riverdale [224] Ranch—

(Testimony of Melbourne C. Whiteside.)

A. That is under an expense item in the return.

Q. Well, it is reported in the return, though, isn't it?

A. It doesn't say it is a loss on the sale of the ranch. I would like to see a computation of that \$84.22.

The Court: Pardon me. What does it say on the report? Will you read it, please?

A. Under "Riverdale Ranch" there are two columns, one "Income" and one "Expense." They have one expense item, "LG.frv., \$30," and then, "Loss on sale, \$84.22." I *don't* if that is the sale of the ranch or sale of some equipment on the ranch. The sale on the—the gain on the sale of the ranch was a considerable amount in excess of that. It was no loss.

Q. (By Mr. Lewis): Wasn't that changed by your computation which we agreed was correct, was changed by going back and not taking the original cost of the ranch but taking it upon the death of the party, which is a correct way, I admit, legally—the valuation at the date of death?

A. I do not recall how this \$84.22 was computed.

Q. I am not asking you about that. But I say, isn't the cost—isn't it possible the cost changed—

A. That is correct.

Q. —would be because of the changes that we agreed to in conference?

A. As I recall, you agreed to the income or the profit, as [225] we determined it. Now, what the differences were, I don't recall at this time.

(Testimony of Melbourne C. Whiteside.)

Q. You don't recall now?

A. I recall it was something in connection with the basis of the property, but not the exact figures.

Mr. Lewis: That is all.

Mr. Drewes: No further questions.

The Court: Witness excused.

(Witness excused.)

HUBERT C. MYTINGER

called as a witness on behalf of the government, sworn.

The Clerk: Please state your name, your address and your official capacity to the Court and to the Jury.

The Witness: My name is Hubert C. Mytinger—spelled M-y-t-i-n-g-e-r. My address would be 100 McAllister Street, San Francisco. I am employed as technical advisor, office of the Regional Counsel, Penal Division, Bureau of Internal Revenue, at that address.

Direct Examination

By Mr. Drewes:

Q. Mr. Mytinger, what is your present employment?

A. Technical advisor, Office of the Regional Counsel, Penal Division.

Q. And as such, what is the nature of your duties?

A. I review the reports submitted by the agents

(Testimony of Hubert C. Mytinger.)

on income [226] tax cases where prosecution is recommended, assist the attorneys in preparation of cases from a technical standpoint, and assist in trials such as this.

Q. How long have you been so employed, Mr. Mytinger? A. A little over six years.

Q. Were you employed by the Government prior to your present employment? A. I was.

Q. And in what capacity?

A. I served as a revenue agent for approximately eleven years.

Q. Are you a certified public accountant?

A. I am.

Q. And in what state are you so licensed?

A. California.

Q. You have already indicated you have testified in trials of this nature before?

A. I have.

Q. And in what courts have you so testified, Mr. Mytinger?

A. The Federal District Courts, San Francisco and Sacramento.

Q. And can you state to the best of your recollection approximately the number of cases in which you have taken part?

A. I would say close to a dozen.

Q. Now, Mr. Mytinger, you have been in constant attendance at the trial of this case, have you not? [227] A. I have.

Q. Have you heard all of the testimony?

A. I have.

(Testimony of Hubert C. Mytinger.)

Q. And you have examined all of the exhibits which have been introduced into evidence?

A. I have.

Q. Now, pursuant to my request have you prepared computations of net worth and income in this case?

A. I have.

Q. Will you let me have your computations, please?

A. (Witness producing.)

Mr. Drewes: May the record show, your Honor, that I am furnishing counsel for the defense with a copy of the computations, and I have one for the use of the Court? I hand it to the Clerk, if the Court so desires. And I have also prepared a number for the convenience of the Jury, your Honor, which I should like to give to the jurors at this time.

(Handing to a juror.) Would you be kind enough to pass them down and keep one for yourself?

Each of the jurors have a copy?

Q. Now, Mr. Mytinger, the computations which you hand me are based entirely on evidence admitted in the case?

Mr. Lewis: Your Honor, just a moment. I want to make an objection here to the accuracy of the net worth statement that they are giving to the Jury under "Non-deductible [228] expenditures." They include, "Gray Shop" for \$1,391.01. I believe the evidence shows that the lady testified as follows:

"Q. There are certain payments indicated here which are totaled at the sum of \$1,309.11. They are indicated as being cash payments by this ledger

(Testimony of Hubert C. Mytinger.)

sheet. You can't tell from that indication whether or not that was a cash payment or a payment by check, can you?

"A. Well, no, because whenever the bookkeeper makes a transaction there it is always posted as check. However, we may have records from way back to where we can indicate whether it is cash or check.

"Q. But you can't tell from this record?

"A. Not on the ledger, no, sir."

Mr. Drewes: What is your objection again?

Mr. Lewis: My objection to it is that under Stipulation five that it is not provided for as one of the uncontested items, and no proof was made that there was any cash payments to the Gray Shop in the year 1946.

Mr. Drewes: You are relying on a point of the stipulation, are you, Mr. Lewis?

Mr. Lewis: Yes.

Mr. Drewes: What page? [229]

Mr. Lewis: On page 4 of the stipulation:

"These figures include Federal income taxes paid, but exclude all items appearing in the preceding paragraphs of the stipulation and do not include the following items of alleged expenditure during the year 1946,"

and under "Cash payments, Gray Shop (year 1946), \$1,357.08," is covered and now they come in with this \$1,391.01, when the woman testified that she couldn't tell whether it was cash or not.

Mr. Drewes: The basis of your objection is that

(Testimony of Hubert C. Mytinger.)

in the list of the items we have excluded from the stipulation we group this under a title, "Cash payments," and we can't prove that is cash because some of it might have been paid by check.

Mr. Lewis: The stipulation provides for cash payments and we also enumerate in the stipulation personal checks that we didn't recognize as non-deductible expenditures, and they are itemized separately there. They did not prove any cash payment.

Mr. Hagerty: Then there is the further objection, too, your Honor, that the evidence on this ledger sheet shows——

The Court: Let us take up the items as we go along. I will meet that as we go along.

You prepared this?

A. Yes, I did. [230]

The Court: I think that we had better take up the Net Worth Statement and if you have any objection, you can object to that item when we approach it. I will have the arguments in mind. You might examine this witness on the Net Worth Statement.

Mr. Drewes: If your Honor please, do you have the stipulation before you, your Honor?

Mr. Lewis: Your Honor——

Mr. Drewes: Do you have this stipulation, your Honor? There is nothing to examine this witness on. The objection made by counsel is a highly technical one. This particular item is under the third section of the last section which is excluded items,

(Testimony of Hubert C. Mytinger.)

and for purposes of convenience this particular item is listed under a caption which is entitled, "Cash Payments," and the objection is interposed on the flimsy ground that some of the payments were by check, and we don't know which is by check and which is by cash. I will submit it, your Honor.

The Court: The stipulation shows \$1,357.08.

Mr. Drewes: Yes.

The Court: And the net worth statement prepared by this gentleman demonstrates \$1,391.01.

Mr. Drewes: That is not the basis of the objection, as I understand it, your Honor. The basis of the objection is that the ledger sheet shows that the amounts were received but it doesn't appear they were cash, that it might have been by [231] check.

The Court: I will overrule the objection.

Mr. Drewes: Take exception, your Honor.

The Court: All right.

Mr. Lewis: Now, your Honor, I would like to make the objection to the entire basis—the net worth basis of proving this case, on these grounds: Courts have held in the net worth cases that the Government has to offer proof that there was outside income not reported on the taxpayers' books, or that he did not keep books showing a profitable source of income to the taxpayer.

Mr. Drewes: Shouldn't this motion be made at a later time in the proceedings, your Honor? The Government hasn't rested.

The Court: I think probably so. I will reserve

(Testimony of Hubert C. Mytinger.)

the hearing of the motion. I think I have in mind what you are approaching, counsel.

Mr. Hagerty: It is our position, your Honor, that evidence on a net worth basis should not be deemed to be brought in until the corpus delicti is established.

The Court: Let us first, counsel, look objectively at this net worth statement.

I wish you would tell the Jury, mindful this is probably the first time some of these jurors have heard a net worth statement—at least thus far we have only had a few allusions [232] to net worth—have this witness tell the Jury and the Court the processes of leading up to a final drafting of a net worth statement, how he approached it in generality.

You have a stipulation here as to the sum of the subject matter.

Mr. Drewes: Yes, your Honor.

The Court: But have the witness tell the Jury something about a net worth statement and how it was prepared. Will you do that, please?

A. Sure.

The Court: In a general way.

A. A net worth statement as such would mean the value of a man's assets after allowing for his debts. The net worth statement, as it is used in this type of case, does not reflect the true value of the assets, but it reflects the amount that he has invested in those assets. It does, of course, reflect the amount that he owes on all liabilities, and subtract-

(Testimony of Hubert C. Mytinger.)

ing the liabilities from the total investment in the assets gives what we call net worth. It more truly could be termed as net investment remaining at the end of the year.

Q. (By Mr. Drewes): In this particular computation which you made, which you have made, upon what evidence did you rely, Mr. Mytinger?

A. The evidence relied upon with respect to a very few items is contained in the stipulation, Government Exhibit 15. Those exceptions are the Asturias stock or investments. Exhibits 14 [233] and 15 are relied upon, and the testimony of two, I believe, witnesses, at the trial, and with respect to the cash in safe deposit box, Government Exhibits 25 and 45, are relied upon, together somewhat with—pardon me one moment while I locate it here—

Mr. Lewis: Mr. Mytinger, would you talk just a little bit louder?

A. Yes. Coupled with Exhibit 24, the net worth statement of the defendant. Now, as to the expenditures on the second sheet of the tabulation as noted there, the nondeductible expenditures, one item appears under each year which does appear in this stipulation; two items appear under 1946, namely, I. Magnin and Gray Shop, which are supported by the evidence and testimony separately.

Mr. Lewis: Object to stating, "supported by evidence." That point is still before the Court as to whether the nondeductible expenditures in the Gray Shop were supported by any evidence.

(Testimony of Hubert C. Mytinger.)

The Court: Overruled.

Q. (By Mr. Drewes): It is based on an exhibit in evidence? A. That's correct.

Mr. Lewis: Take exception.

The Court: Overruled.

A. Likewise the non-taxable portion of the capital gain appearing on the second sheet is in the stipulation. [234]

Q. (By Mr. Drewes): So just to recapitulate, your computations are based, for the most part on the stipulation. However, you have also——

A. That's right.

Q. ——included the Asturias items, the cash involved, and then with respect to nondeductible expenditures, the exhibits which have been introduced covering I. Magnin Company, the Gray Shop?

A. That is right.

Q. Now, Mr. Mytinger, according to your computations, what were the total efforts of the defendant and his wife as of the last day of 1944, 1945 and '46?

A. As of December 31, 1944, \$196,002.07; as of December 31, 1945, \$265,113.29; as of December 31, 1946, \$323,395.29.

Q. And now will you state what the liabilities of the defendant and his wife were as of the same date?

A. As of December 31, 1944, \$5,000.00 even. The same amount at the end of December in 1945. As of December 31, 1946, \$40,201.67.

Q. Now, would you state, according to your com-

(Testimony of Hubert C. Mytinger.)

putation, the net worth of the defendant and his wife as of the same dates?

A. As of December 31, 1944, \$191,002.07; as of December 31, 1945, \$260,113.29; as of December 31, 1946, \$283,193.62.

Q. Now, will you state by what amount the net worth of the defendant and his wife increased in the years 1945 and 1946? [235]

A. In 1945 the net worth increased \$69,111.22. In 1946 the net worth increase was \$23,080.33.

Q. And now, according to your computation, what was the total amount of nondeductible expenditures not included in the net worth computation for the years 1945 and 1946?

A. 1945, \$19,081.32. In 1946, \$26,240.37. I might say that total does not appear on that typed sheet. It is the total of three items.

The Court: Would you explain to the jurors what you mean by nondeductible expenditures?

A. Yes. Those are expenditures for living expenses, Federal income taxes, other current expenditures of a nondeductible nature. They do not include investments which are otherwise set forth under the caption, "Net Worth Items."

Q. (By Mr. Drewes): And now, Mr. Mytinger, according to your computations, what was the amount of nontaxable capital gains of the defendant and his wife for the two years 1945 and 1946?

A. 1945 it amounted to \$139.77. In 1946 it amounted to \$464.47.

Q. According to your computations, assuming

(Testimony of Hubert C. Mytinger.)

that net worth income is represented by the increase in net worth plus unallowable expenditures, less non-taxable income each year, what would be the total net income of the defendant and his wife in 1945 and 1946?

A. For 1945 it would be \$88,052.77. For 1946 it would be [236] \$48,856.23.

Mr. Drewes: I will pause to put those on the board.

Q. For the year 1945, Mr. Mytinger, the figure is \$88,052.77, is that correct?

A. That's correct.

Q. And for the year 1946, \$48,856.23?

A. That is correct.

Q. Is that correct? A. That is correct.

Q. Now, according to your computations, Mr. Mytinger, what was the total amount of net income unreported by the defendant and his wife for the two years? A. 1945, \$46,985.16.

Q. And for the year 1946? A. \$25,341.61.

Q. And will you state from your calculations the reported income by the defendant and his wife for the years 1945 and 1946?

A. For 1945 the returns show that they reported \$41,067.61.

Q. And for the year 1946?

A. For the year 1946 the returns showed a reported \$23,514.62. [237]

Q. Mr. Mytinger, assuming that the unreported income to which you have just testified is taxable one-half to each spouse on his separate return, and

(Testimony of Hubert C. Mytinger.)

assuming further that income as best corrected includes taxable long term capital gain as follows:

In 1945, \$139.77, and in 1946, \$464.47, and assuming further that each spouse is entitled to exemptions as claimed on the returns which were filed by them in 1945 and 1946 what is the corrected amount of net income for the year 1945 for Milton H. Olender? A. \$44,588.96.

Q. And what is the corrected amount of net income for the year 1945 for Mrs. Olender?

A. \$43,463.81.

Q. What is the correct taxable liability for the year 1945 for Milton H. Olender?

A. \$23,523.67.

Q. And for Mrs. Olender for that year?

A. \$23,058.57.

Q. And what would be the total tax liability for the year 1945, Mr. Mytinger? A. \$46,582.24.

Q. \$46,582.24? A. That is correct.

Q. What is the corrected amount of the net income for the [238] year 1946 for Milton H. Olender? A. \$25,185.62.

Q. And for Mrs. Olender? A. \$23,670.61.

Q. State, if you will, the correct tax liability for the year 1946 for Mr. Olender? A. \$9,171.99.

Q. And for Mrs. Olender? A. \$8,322.83.

Q. And will you give me the total, please, for the year 1946? A. \$17,494.82.

Q. \$17,494.82? A. That is correct.

Q. What is the amount of unreported tax liability for the year 1946 for Milton Olender?

(Testimony of Hubert C. Mytinger.)

A. For the year 1946, \$6,117.14.

Q. And what is the unreported tax liability for the year 1946 for Mrs. Olender? A. \$5,814.89.

Q. May I have the total unreported tax liability for 1946? A. \$11,932.03.

Q. \$11,932.03? A. That is correct. [239]

Q. And what was the reported tax in 1946?

A. 1946 they reported a tax liability of \$5,562.79.

Q. And what was the reported tax liability for both Mr. and Mrs. Olender for the year 1945?

A. In 1945 they reported a total tax liability of \$15,495.75.

Q. \$15,495.75? A. That is correct.

Q. And what was the unreported tax?

A. The total unreported tax liability for 1945 is \$31,086.49.

Q. \$31,086.49? A. That is right.

Q. Mr. Mytinger, have you examined the returns filed by the defendant and his wife for the years 1942, '43 and '44?

Mr. Lewis: I object, your Honor. There is no foundation for that question.

Mr. Drewes: This again refers——

The Court: Overruled.

Mr. Lewis: Exception.

The Witness: I have.

Q. (By Mr. Drewes): Will you state the aggregate amount of net income reported on those returns?

A. In arriving at this aggregate I would like to explain one assumption or calculation I had to

(Testimony of Hubert C. Mytinger.)

make on the 1944 return filed by the defendant's wife.

Q. Please do. [240]

Mr. Hagerty: Object to that, your Honor, as not being responsive to any pending question and move to strike. It is a voluntary statement by the witness.

The Court: Overruled. You may explain.

A. The last sheet of that return, the one on which the deductions would appear is not attached to the return. There is a schedule attached to the return of the husband, Exhibit 9, which shows that she was to claim a total deduction of \$538.50. I find that by subtracting that amount, \$538.50 from the income shown on the face of her return, \$18,263.86, I arrive at a net income which apparently would be shown on the third sheet of her return of \$17,725.36. I further find that by allowing the same exemptions as she claimed on her 1945 return, the next nearest comparable year, I would have the resulting tax liability of \$6,329.45 also shown on the first sheet of her return. So I assume that this filing of net income was the \$17,725.36 which has been reported on her 1944 return.

Q. With that assumption what is the total figure?

A. Using that figure and the net income as otherwise shown on the other returns in evidence for 1942, '43 and '44 there is an aggregate net income reported of \$89,431.60.

Q. Mr. Mytinger, have you examined the as-

(Testimony of Hubert C. Mytinger.)

assessment certificates which were prepared by the Collector of Internal Revenue and are in evidence as the Government's Exhibits 21, [241] 22, and 23?

A. I have.

Q. State if you will the aggregate amount of taxes paid by the defendant and his wife as reflected by those exhibits for the years 1942, '43 and '44?

A. I find a total income tax was paid during 1942, 1943 and 1944 amounting to \$16,871.07.

Mr. Drewes: No further questions.

Cross-Examination

By Mr. Lewis:

Q. Mr. Mytinger, could you make the computation for the year 1946 for us taking out the non-deductible expenditure covered by the Gray Shop in the sum of \$1,309.11?

A. You say could I, Mr. Lewis?

Q. Yes.

A. Yes, I could. It would take a little time, but it could be done.

Mr. Drewes: Are you asking him to do that, Mr. Lewis? If your Honor please, I fail to see the purpose in this list of adjustments and cancellations. The matter was argued and I understood your Honor to rule. At least, at this stage of the trial the Gray Shop evidence is in the record duly admitted and stands for all purposes.

The Court: Where is the exhibit on the Gray Shop?

(Testimony of Hubert C. Mytinger.)

Mr. Drewes: As I understand the objection, your Honor, counsel does not object that those payments were not made. [242] The objection is based on the grounds that the record doesn't show that the payments were made by cash or check, and by virtue of the facts in our stipulation, in excluding that from the stipulation we, for purposes of convenience, simply listed it with other items under a caption, "Cash payments." Therefore, the matter is not adducible in evidence.

Mr. Hagerty: There was an additional objection.

Mr. Drewes: No objection was made at the time it went into evidence, I might say.

Mr. Hagerty: There is the additional point, your Honor, that this account was used by a daughter.

Mr. Drewes: The record doesn't so show.

Mr. Hagerty: It certainly does, and I brought it out in cross-examination. The girl that testified here, Mrs. Micheli, couldn't tell who made the payments, but the ledger sheet itself says, and she read it, the top notation in red ink up in the right-hand part of the ledger, that the daughter was entitled to come in and charge and she did make payments on account.

Mr. Drewes: That is a matter of defense, your Honor. The fact that she could doesn't establish that she did. That was introduced as part of the Government's case in chief. If there is any question as to who made the charges let the defense prove it at the proper time. [243]

(Testimony of Hubert C. Mytinger.)

Mr. Hagerty: That becomes a matter of credibility for the jury in assumptions of this sort. He is assuming it is the fact. It is for the jury to determine whether it is the fact.

The Court: The account shows total payments in the amount of \$1,309.01 and that is the record before the court. Accordingly, I will overrule the objection.

Mr. Lewis: Exception, your Honor.

Q. (By Mr. Lewis): Mr. Mytinger, in working out your net worth for the purpose of your figures I notice that you used cash in safe deposit box as of December 31st, 1944, \$50,000, and the sum of \$7,200 cash as of December 31st, 1945. You did not then take into consideration in these figures the cash figures as shown in Mr. Friedman's affidavit, did you?

Mr. Drewes: Objected to. There is no such affidavit in evidence, your Honor.

The Court: Did you make reference to any such affidavit?

The Witness: No, your Honor.

Q. (By Mr. Lewis): In the list of savings, not savings bonds, but your treasury bonds for the year 1945 you used a total of \$82,000. Included in that sum of \$82,000 was the \$20,000 worth of bonds that the witness has testified to as "mother's bonds"? Do you remember the testimony of Mr. Ringo? [244]

A. I remember Mr. Ringo explaining an entry made, I believe, on an inventory that he took with

(Testimony of Hubert C. Mytinger.)

notation, "Bonds belong to mother," or something like that.

Q. Yes, but those bonds are included in the \$82,000 figure that you used here, that \$20,000?

A. That is correct.

Mr. Lewis: I think that is all, your Honor. Your Honor, I might request that Mr. Mytinger remain in the courtroom. After we present our case I may want him to make another computation.

The Court: All right.

Mr. Drewes: I have no further questions at this time.

Mr. Lewis: No further questions.

Mr. Drewes: If your Honor please, the record in this case would show that the United States subpoenaed one George Goodman of Miami Beach, Florida, to appear to testify and produce documents. I have before me a letter from a physician of Miami Beach, Florida, one Jessie O. Halpern, in which he states that——

Mr. Hagerty: I will object to this going in before the jury as a hearsay statement.

Mr. Drewes: I ask that it be made a part of the record in this case.

Mr. Hagerty: Object to its introduction, your Honor.

The Court: May I see it? I will discuss this with [245] counsel at the recess, that is, the letter from the doctor. Are there any other items that you desire to examine this witness on?

Mr. Drewes: No, your Honor.

(Testimony of Hubert C. Mytinger.)

The Court: Will you explain to the Jury the item of the Asturias stock in the amount of \$10,000? If, as the report shows, the corporation proved to be defunct and the stock valueless, upon what basis or theory do you set it up as having a value in 1946?

The Witness: It is my understanding the only evidence thus far before the Court as to its worthlessness is as of December 31st, 1947. For income tax purposes each year has to stand by itself, hence the value at the end of 1946 representing the amount invested in this stock or as a loan would still be charged as part of the defendant's net worth at the end of 1946.

The Court: You made a distinction, at the outset of your testimony, between net worth and expenditures of a capital nature, did you not, wherein you stated that if the stock had no value in 1946, and if it appeared that this gentleman invested \$10,000 in the company, Asturias Company, notwithstanding, would you set it up in the net worth?

The Witness: No, I would say if it had no value, your Honor, and if it were included in his net worth statement representing an investment it would then be allowed [246] below as a loss on worthless stock. However, I believe if you will refer to the corporate records you will find some of this stock was issued as late as the middle of the year 1947, and the last investment, it is my recollection and will be supported by the corporate record, the last investment occurred well towards the end of the year 1946 indicating to me that at that date at least

(Testimony of Hubert C. Mytinger.)

there is no present question or evidence as to its worthlessness at the end of 1946.

The Court: Have the jurors any questions? If you wish to address any questions concerning this net worth statement to this witness you may do so through the Court. Any explanatory matters that you may desire. If not, we will take the afternoon recess now for a short period of time with the same admonition to you.

Mr. Drewes: If your Honor please, the United States will rest at this time.

The Court: All right, I will hear counsel on a couple of matters. Same admonition, ladies and gentlemen. You may retire.

(The following proceedings were had in the absence of the jury):

The Court: The Government rests?

Mr. Drewes: The Government rests.

The Court: With respect to this letter, counsel for the Government received it from Jessie O. Halpern, 350 Lincoln [247] Road, Miami Beach, Florida, written in connection with Mr. George Goodman. George Goodman, I assume, is a material witness?

Mr. Drewes: Yes, your Honor. You will recall that the Goodman transactions in 1944 were referred to many, many times and have been. It was our purpose to produce him to testify to those transactions, although they were in a year preceding the prosecution years, they were to be offered on the basis, of course, of showing a scheme, design and

pattern. I regret that the letter which your Honor has before you was not in affidavit form, but, of course, we have no control over those things, your Honor. That was the response received and time did not permit any further steps to be taken.

The Court: When did you first make a determination, or cause a determination to be made as to whether this witness would be available?

Mr. Drewes: My recollection is that he was subpoenaed on the 10th of September, your Honor.

The Court: You had no prior knowledge of any illness?

Mr. Drewes: None, sir.

The Court: He states he is suffering with chronic asthma and at the present time is experiencing an attack of asthmatic bronchitis precipitated by a virus infection. For the past several months he has required many injections of adrenalin frequently given in emergency at Mount Sinai [248] Hospital. For these reasons he has been advised not to subject himself to physical exertion, emotional stress and strain, or change in climate. Is the Government willing to accept this letter in the record?

Mr. Drewes: We are, your Honor.

The Court: It may be lodged in the record, then. Now, you had some matter, Mr. Lewis, that you were about to take up with me on net worth?

Mr. Lewis: Yes, your Honor. As you will remember, I objected to any evidence going in on the net worth method for the reason that in all the deciding cases that I have been able to find on net worth and expenditures method, the Government

proved independently an affirmative evidence, the receipt of unreported income from the specific transaction or specific source of income. Such cases as black market overpayments, the party did not have a full and complete set of books; that he had some business which he did not report on his return and outside source of income was proven, or else they proved income in that particular business.

In this case they have not proven any profit from any transaction that was not in the books. They have also introduced evidence, and I want to renew my motion or objection to the evidence of Charles Ringo, and all the documents, communications from the defendant that went into the record on the grounds of privilege; that the attorney [249] cannot waive the privilege, that only the clients can waive the privilege, and the Government would not have any case at all here even to go to the jury if it was not for the evidence acquired from Mr. Ringo who is the attorney for the defendant, and I think that that evidence should be stricken from the record at the present time and that a motion of acquittal should be granted because the Government has not proved a net worth case in the manner prescribed by the cases of *U. S. vs. Chaplin*, *Scheueran vs. U. S.*, *U. S. vs. Skidmore*, *U. S. vs. Johnson*, *U. S. vs. Potsen* and *Gluckman vs. United States*, all of which cases were based upon the idea that a party was engaged in some business wherein he received an outside source of net income which is not shown in this case in any manner whatsoever.

Mr. Drewes: If your Honor please, the record is

replete with testimony to the effect that the taxpayer's books were not complete, and thus amply justifies the use of a net worth approach at this particular trial. Your Honor will doubtless recall the testimony of the witness Ringo.

At page 68 of the record the following appears, questions asked by myself and responses by Ringo:

“Q. Why did you ask him to bring net worth figures for each year?

“A. In order to reconcile his income with his net worth. [250]

“Q. Why did you make an audit—strike that. I take it that you did not make an audit of his books and records?

“A. No, I did not make an audit of his books and records.

“Q. Will you explain why you did not?

“A. Well, in a great many of these transactions they were purely cash transactions by use of currency and so forth, and it would have been impossible to really verify figures.”

That is testimony in part only of the witness Ringo.

The witness Blanchard, your Honor, you will recall, testified that he first questioned—that when he first questioned the defendant he was engaged in another inquiry and he found in connection with that inquiry that certain transactions in the year 1944, so-called Goodman transactions, were not on the books either. That testimony went into the record without any objection.

The Court: Counsel, at one stage of the case, I

believe Mr. Lewis, stated some theory on wash sales. What was your theory on wash sales? Did you have a theory on that?

Mr. Lewis: Yes, your Honor.

The Court: Pardon me, counsel, I didn't intend to interrupt you. Have you completed your thought?

Mr. Drewes: Well, there is other evidence, your Honor. [251] The agents have testified that the Lerman transactions which were negotiated by Leavy were in the books in the form of a capital investment rather than as a purchase and sale as would ordinarily be the case, and there is further evidence with respect to the Saraga transactions.

Mr. Leavy testified that he took funds east to Mr. Saraga, Saraga in turn after several transactions sent the money back to the taxpayer and that money went into his personal account, not into the account of the Army-Navy Store. So there is ample evidence in the record that the taxpayer's books are not complete.

The Court: Went into the capital investment account?

Mr. Drewes: One did. There were two. The Saraga transaction went into the personal account of the taxpayer.

The Court: What was the Saraga transaction as to amount?

Mr. Drewes: \$7,000, roughly. Mr. Leavy testified he took between six and seven thousand dollars back, and Mr. Saraga produced his books and there were lots of transactions, but as the record shows now a check in the amount of approximately \$7,700

was returned by Mr. Saraga to the taxpayer because he could not make delivery on the suits, and the greater part of that sum went into the personal account of the taxpayer rather than into the books of account of the Army-Navy Store. So all that testimony, your Honor, is to the effect [252] that the books were not complete. An audit would be absolutely unproductive and amply justifies the use of a net worth approach.

With respect to the privilege of Mr. Ringo, I think the entire record shows that he was employed as an accountant.

The Court: There isn't any question in my mind as to the propriety of my ruling on that score. Only very recently I briefed that very carefully and handed down a ruling in connection with the Chin Lim Mow case which was recently tried in this Court and the problem in the Chin Lim Mow case was perhaps a little more serious than the problem in the case at bar because in the instant case there is no evidence at all that the gentleman, Mr. Ringo, at any time functioned as a lawyer, or in fact the defendant employed him as a lawyer. He was employed as an accountant solely and simply.

Mr. Drewes: He so stated.

The Court: The fact that his business card may have included thereon, "attorney-at-law" or "counsellor" as it may appear would not be any criteria in the determination of his role or the role that he played, or his relationship with the accused in the case at bar. Therefore, I overruled the objection and I think with propriety.

Mr. Hagerty: Your Honor didn't permit us to put the defendant on to show the transactions, how he happened to retain Mr. Ringo. [253]

The Court: I couldn't consider that as proper. I make my rule in the light of the evidence as it unfolds.

Mr. Hagerty: I asked on the voir dire examination of Mr. Ringo that we be permitted to let the defendant take the stand for that limited purpose, to show what he retained Mr. Ringo for.

Mr. Drewes: Wouldn't the solution still be on what was done, not what was said or intended by the defendant? I assume what the defendant said would be as favorable as possible.

Mr. Hagerty: In the course of our case we will amplify on that.

The Court: On the subject of the propriety of the net worth theory, in the light of the record before the Court I think that this is a case that comes within the net worth and expenditures theory. It should be explained to the Jury, however, counsel, as you progress at some stage that the net worth theory is a substantial picture, that it does not purport to be a strictly accurate picture of the man's condition. That has not thus far been done.

Mr. Lewis: Your Honor, in order to clarify these matters, I believe it would probably be in the interests of expediting the case, we have certain instructions ready, and I assume that Mr. Drewes has some, we should have a conference Monday

morning to see how many of the instructions [254] we can agree on.

Mr. Drewes: My instructions are being prepared even now.

The Court: What does the rule say about instructions, gentlemen?

Mr. Drewes: Unfortunately I don't know.

The Court: The rule of course states that the instructions must be handed in at the start of the case. I know of judges presiding in these courts who might crack your knuckles at this juncture and even suggesting instructions.

Mr. Lewis: The reason I brought that up is that Judge Roche requested us to do just what I was suggesting now.

The Court: Well, I realize the burdens on Government counsel as well as the defense counsel. I have no objection to the instructions coming in at a late period. The reason that the instructions should be offered at the start of the trial is to give the Court an opportunity to assimilate the theory of the case in the light of the instructions.

There are no unusual principles of law applicable in this case, as I see it. I think it is the routine net worth case unless there be something unusual, and that is the reason the rule provides that the Court should have the instructions. The Court is not only trying one case. Very often, as you gentlemen know, there are many phases of his life occupied in chambers. It is not an easy routine affair and otherwise the rule wouldn't be on the books. I will [255] receive the instructions when

you have them ready, but I would like to have them in as early as you can get them.

Mr. Lewis: They will be ready Monday, your Honor.

Mr. Drewes: Ours also, your Honor.

The Court: Then I will assimilate the instructions and go over them, and at a later date indicate to counsel on both sides the instructions I propose to give. At that time you can make such suggestions as you have. I treat it informally, but I give counsel ample opportunity to indicate to the Court.

What happened in this Sloane account? I see a liability account of \$24,701.00. Did this gentleman buy that furniture in one year? Is that all in one year?

Mr. Lewis: Your Honor, he made a deposit and he evidently purchased—the deposit was a down payment, but he wasn't ready to move into his home so it shows a liability account, because it was on the books at Sloane's as a liability at that time and they have included it in the furniture account. So it is really a wash transaction in that regard.

The Court: It appears to be a very substantial amount on account of furnishings in a short period of time.

Mr. Lewis: He bought a new house over in Oakland and refurnished it entirely, and he hasn't taken delivery of the furniture and that is why it shows as a liability account, to balance the asset account the same way. [256]

The Court: The increase in non-business bank

accounts in 1944, \$3,000, jumped to \$31,000 in 1945. How do you account for that?

Mr. Shelton: Your Honor, it is just that I suppose the business was in such a stage that he had a smaller part of his capital employed than he had had in the earlier year, perhaps less tied up in inventory or other items. He just happened to have a——

The Court: What is this matter? Pardon me, I think I understand that now. What is this other matter that is referred to rather fleetingly in terms of an affidavit or of Judge Friedman?

Mr. Lewis: Well, Judge Friedman was on a——

Mr. Drewes: Would your Honor care to see the affidavit?

The Court: I am not privileged to see the affidavit. I suppose it would not be proper for me to look at it, but references were made to it.

Mr. Lewis: Yes, your Honor. Well, we have no objection to His Honor reading the affidavit.

Mr. Drewes: I certainly have no objection for the Government.

The Court: The Jury is getting fragmentary pictures of references to it.

Mr. Hagerty: We will outline the picture in our opening statement, your Honor, to cover the whole thing. [257]

The Court: I am just trying to clarify little things that have occurred in my mind, and naturally they will occur in the jurors'.

Mr. Lewis: I think there are probably several more in the jury's mind.

The Court: 12-31-44, cash in safe deposit box, \$50,000. Then it was reduced in 1945 to \$7,200.

Mr. Lewis: That item, your Honor, was taken off of the Ringo statement, as I understand it.

The Court: That was that little memoranda sheet that I examined?

Mr. Lewis: That is right, your Honor. I think that is where they get that figure.

Mr. Drewes: And from Mr. Ringo's working papers. Would your Honor care to examine this affidavit?

The Court: I prefer not to. It hasn't been offered. I try to keep myself free in my mind. We will take a short recess, gentlemen.

(Short recess.) [258]

(The following proceedings were in the presence of the Jury.)

Mr. Lewis: Your Honor, in this matter, it is getting close to closing time and our opening statement will be quite lengthy. We propose a recess until Monday morning, when we will make our opening statement, in which we will outline all the facts, and the order of proof which we are going to prove our case, and I think the Jury would have a clearer picture in the matter if we were given the opportunity to take the transcript and run right along with it in a rebuttal testimony.

The Court: I have no objection.

Ladies and gentlemen, you heard the statement of counsel. Monday morning next counsel for the defendant intends to outline their defense. The Gov-

ernment is resting its case, and accordingly, in the order of things, the defense will present its case to you.

How much longer do you think we will be engaged?

Mr. Lewis: Oh, I think we probably will finish some time Wednesday, your Honor. Of course, I can't tell how long Mr. Drewes will cross-examine our witnesses.

The Court: This case may reach the jury, then, at the end of the week?

Mr. Drewes: I think very likely then, your Honor.

The Court: We will adjourn, ladies and gentlemen, for [259] today. The same admonitions to you not to discuss the case or form an opinion until the matter is submitted to you.

I notice the Jury has those statements.

Mr. Lewis: I wonder if they would lodge them with the clerk.

The Court: I think it would be easier on the jurors if they lodge the statements with the clerk. And on the occasions that they desire them, they will be presented to you. Otherwise you may take them home and worry about them.

I desire to talk to counsel briefly. You may retire and leave the statements with the clerk.

(Thereupon the Jury was excused.)

(Following proceedings out of the presence of the Jury:)

The Court: Now, in connection with the several motions presented to the Court, I should like to rule on the motion to strike. The motion is denied, formally, for the record, so that the clerk may have a record here.

And you made a motion to acquit, did you?

Mr. Lewis: Yes.

The Court: That motion is denied.

You have your exceptions.

Mr. Lewis: Yes.

The Court: I note that on occasion you note an exception. As a matter of law, under the rules, your exceptions are preserved intact and inviolate without noting them. However, if [260] you desire to note them, I have no objection.

Mr. Lewis: It is a habit with me from the procedure in the Tax Court. If you don't note the exception, they don't pay any attention to it. I don't want to get out of the habit.

The Court: Probably just as well. However, I have no objection if you urge them. If you don't note them, the Court reserves them under the rules for you.

Mr. Lewis: Thank you, your Honor.

The Court: Ten o'clock Monday.

(Thereupon an adjournment was taken until Monday, September 22, 1952, at 10:00 o'clock a.m.) [261]

September 22, 1952, 10:00 A.M.

The Court: Stipulated that the jurors are present, gentlemen.

Mr. Hagerty: So stipulated, your Honor.

Mr. Drewes: Yes, your Honor.

The Court: The opening statement, Mr. Hagerty?

Mr. Hagerty: Yes, your Honor.

May it please the Court, the Government counsel, and my colleagues, at this time, ladies and gentlemen, I have the right and the duty to explain to you the complete defense we have to these charges that are brought here by the Government against this defendant.

First of all, because some of you are new jurors, I want to state that I am sure it will be stipulated by the Government, otherwise we will prove it, this is not a suit for collection of taxes. There is such a suit pending in the United States Tax Court. This is solely a criminal proceeding, and it partakes of all the aspects of every criminal case, that the burden of proof is upon the Government to prove beyond all reasonable doubt the truth of every material element of the charge.

The material elements of the charge are principally two, that this defendant had unreported income and that with specific intent to so do he evaded the income tax laws. That [262] is the question here. That is the problem and the issues that are presented to you, and it is very similar to the average criminal case where there would be one of violence or one of stealth. You have the same

elements present and you as the jury must decide the facts that are actually proved here by the evidence.

We will demonstrate that the method used by the Government, that is the net worth method, although it is recognized as a good method, sometimes in arriving at certain results and estimating a man's wealth, that it is only as good as the investigation and the facts brought to bear in the first instance. In other words, if we start out with the wrong initial net worth, if our figures are in error to begin with, we can never hope to arrive at the correct result, and our whole defense will be pointed pretty much at that, that the Government's assumption in the initial net worth of this man is way off, that the defendant's original wealth was far greater than that shown by the Government.

We will show that the defendant was born here in San Francisco in 1895, I believe, that he was reared in San Francisco, went to school here, and ultimately graduated from the University of California.

Some of his early childhood was spent up in the Mother Lode country. His mother and father were in business, they had a little store, and his father sometimes made wagon trips [263] to nearby mining camps.

The defendant helped his mother from a very early age in the store and a very close bond developed between mother and son which lasted all through her life.

The family re-moved to Fresno before the de-

fendant entered the University of California, and his father there in partnership with a brother entered many business ventures. The father had a couple of stores in Fresno, had a motel, Travellers Hotel, he had the Olender Building, he had one piece of property in Los Angeles that netted him \$20,000 a year. That the Olender, Sr., and the defendant's mother lived very frugally. That over a long period of years they amassed a great deal of money.

The evidence will show that the defendant, when he was graduated from the University of California, he returned to Fresno and went to work for his father. That his father and his uncle thought, well, Milton is in his early twenties now, I assume you want him to be married, so we will give him a store.

So they gave him one of the stores they had and he began its operation. He made money.

Along about 1923 the defendant began to go with an Irish girl. The defendant is Jewish. His father was an Orthodox Jew, Hebrew. So when the defendant became rather serious with this girl the father got quite angry, because he [264] didn't want the defendant to marry outside his race. So the defendant said, "All right, I don't want any of your money." So he turned around and gave the store back and \$25,000 with it to his father and left the store, married the girl, by whom he has had children, and who is still his wife.

The defendant struck out on his own. He worked

at various jobs in Fresno and then came up to the city here, the Bay Area, for awhile.

Then the father asked him to come back. So he did return to Fresno, on the condition that he be permitted to operate his own store again and on his own basis.

As I said, the father was an Orthodox Hebrew, but he was a very shrewd business man. Milton had gone to the University and he wanted modern methods in the operation of the store. I believe they called the store the father operated the "Schlock" store. That is an expression that apparently means this, that there is no definite price on the goods in the store. A person comes in and they size him up and say—well, if they think he can buy it, they charge him \$30, and if they think he can't buy it, they charge him \$20. They start in and bargain down but never let the customer get away. Well, Milton said, "That day is gone. The way to operate a store is to price our goods and operate on a fair basis, and you will prosper that way." [265]

Well, they agreed to let Milton operate his store. Within three months he found the old disease breaking out again, so he up again and left his father. He then borrowed a little money, came up to the Bay Area and worked in various stores here and later on he had an opportunity to go into business around the 800 block on Broadway in Oakland with a cousin or some relative of some sort.

So they did go into business and they were making money again, and about this time the marriage

has lasted, his marriage, and the father is growing old, and the father is repentant of his treatment of the son. So there is a reconciliation and the father comes to Oakland, is in the home constantly with the son, and eventually advances him the money to take over this store, and the store prospers.

So he has a store at 8th and Broadway. Later on there is an opportunity to move up to 10th and Broadway, where his store is still located.

As the years go by he prospered, made more money, and they were attempting to buy the building at 10th and Broadway. We may bring in witnesses to show that. Offers were made of \$35,000 for the building but someone else just offered a little bit more and they missed the sale of the building, although he is still a tenant there.

We will also show that this store which he has in Oakland is not what you might think, a typical Army and Navy salvage [266] store, it is not that type of store at all. It is a store where only new goods are sold and furnishings for the boys in the Army and Navy. It is a new store, where new goods alone are handled.

Well, during this period of time the father repentant as he was of his early treatment of his son told him, "Now, well, I have got your money in my vault in the store at Fresno. Every year I am going to be adding \$5,000 to that."

This went on for several years. The father died. The defendant and the father were the only ones with access to this vault and to this safe in this vault, which we will show you pictures and photo-

graphs of in the store in Fresno. So after the death of the father the defendant brought up from Fresno \$75,000 in cash out of this box that was his and put it in his own safety deposit box in the bank at 12th and Broadway in Oakland, a safety deposit box that he held together with his wife, and in which he had other moneys from his businesses that he already earned. That was about 1942.

Following the father's death the son, who of course had always been very close to the mother, became even closer as her business adviser and consultant, and over the years she made gifts and loans to this defendant. There were other elements of income, sales of property and rentals that the defendant received. So before—we will say, approximately 1944, the defendant had a great deal more money in his safety [267] deposit box than we find the Government giving him credit for in their initial worth statement.

Well, in 1944 the defendant was working very hard in his store, he was under-manned, there was a great shortage of manpower everywhere. His two sons were in the service and he was running the store practically alone. In fact, he nearly broke down his health.

Along that time one of his sons was at an army camp at or near San Antonio, Texas. The defendant wanted to make a trip there to visit him. He had also learned from the son that there was probably an Army and Navy store there available. So the defendant preparing for this trip, he went to an attorney by the name of Monroe Friedman,

who had advised him in other matters, and he asked Friedman to come with him to a safety deposit box in Oakland, and he took his wife's name off the box and entered that of Monroe Friedman and gave Mr. Friedman instructions that on this trip that the defendant was going to make to Texas if it became necessary for him so to do he would wire Friedman and ask him to send him funds out of that box.

We will demonstrate through the affidavit of the present Friedman, who is now presently Judge Monroe Friedman, that there was at that time, that was about April of 1944, there was at that time in that box upwards of \$71,000 or \$75,000. We will further show that this defendant, when he had gone to [268] see Mr. Ringo, the accountant, after being quizzed by the men from the Internal Revenue, that he had totally forgotten that incident. That after this tentative net worth statement was prepared by Ringo and put into the hands of the Government, the defendant, talking with Monroe Friedman, Monroe Friedman said, "Don't you remember? You took me to the bank, and on the bank's records we entered my name on your box, and I counted the money there and you had more than that."

All of this we will demonstrate from bank records, from the affidavit of the judge. The evidence will also show that prior to this other trip and prior to the counting of the money by the Judge, the defendant had taken therefrom \$10,000 to take with him for this proposed purchase of an Army & Navy Store in San Antonio, Texas.

And, of course, the Government by its own evidence, put in the checks of some \$20,550 made to Goodman in January of 1944, which funds came from this vault, and, of course, that was long before, several months before—January to April—several months before Judge Friedman counted the upwards of \$71,000 in the vault. We will show that the Goodman transaction was entered—there were entries pertaining to the Goodman transaction in the defendant's books and in his inventory. Probably if a more careful survey and audit had been made by the Government, they would have found those entries. [269]

But following this, the mother, who is still living in Fresno, would send funds from time to time, loan funds to the defendant, which he would use, and then we have some letters from the mother when he was about to return funds, and she would say, "No, I want you to keep the funds up there. Maybe you can invest them for me," and there were certain discussions between him and he recommended, following the advice of his banker friends, he recommended as a good investment Bank of America stock to his mother and that she said, "No," that her husband had had, in looking back upon the experiences they had during the crash, said, "No, we don't want any stocks, get Government bonds for me," and that the defendant did purchase for his mother upwards of \$20,000 or many thousands—I won't trust my memory because memories are tricky—we will have the records here. We will show what he did buy for his mother.

Those things of course had been charged against him. They were not his at the time.

We will demonstrate that there is nothing smacking of criminality in the handling of large sums of cash money. We will show that in this bank alone, where the Government introduced these records—they call them TCR's—the bank records showing handling of any sums over \$20,000 in cash—that they had scores of such transactions all the time. I believe you will even recall, and I believe His Honor [270] will instruct you, I am sure, that anything we develop from an adverse witness on cross-examination is still a part of our evidence, and you will recall the witness Harley, the man from the Bank of America, testifying that they had so many of these that they had several vice-presidents who could sign the form. So the handling of that alone is not evidence of criminal intent or concealment; that it frequently occurs; that you have to handle large sums of cash in business.

We will show that the Government has spent several years in this investigation. That in that time they have not been able to develop anything more than maybe slight bookkeeping errors, maybe mistaken accounting procedures, that are typical of every business you want to look it. One firm will do a thing one way, another time another way. We will demonstrate that by experts from the stand.

When our evidence is all in, I think that we will have established pretty well everything that I have said, and we will have established that the Gov-

ernment in its initial survey, as I have said before, failed to give the defendant credit for what he actually had. Consequently we will then show that there has been no great increase in the net worth that has not been reported, and we will show you in this case that this defendant has made his income tax returns every year—this isn't a case where he failed to report at all—he has made his returns, he made his returns to the [271] best of his ability, he has reported everything that he could, he told them about everything he knew of his business, he has never had at any time—the very crux of the case that they have to establish before they could achieve their result—he has never had at any time a specific intent to wilfully evade the tax laws of the United States. And when all of our evidence is in we will ask you to stand by your votes as jurors, and not finding that the proof is there on the part of the Government to return a speedy acquittal for this defendant.

Our first witness will be Mr. Carol, who has, as I understand, charge of the safety deposit boxes of the Bank of America, Oakland Main Branch.

CLIFFORD F. CARROLL

was called as a witness by the defendant, sworn:

The Clerk: Please state your name, your address and your occupation to the Court and to the Jury.

A. My name is Clifford F. Carroll. I reside at 1512 28th Avenue, Oakland. I am employed as special agent in the Bank of America, the East Bay District.

(Testimony of Clifford F. Carroll.)

Direct Examination

By Mr. Hagerty:

Q. Mr. Carroll, have you brought with you some records from the Bank of America?

A. I have. [272]

Q. May I see them, please?

A. (Witness producing.)

Q. Mr. Carroll, those records that you have before you, will you identify them for His Honor and the ladies and gentlemen of the Jury?

A. This card is known as a history card, safe deposit box department of the Oakland Branch of the Bank of America, located at 12th and Broadway, Oakland. It is known as Box No. 44.

Q. And what name is that box in?

A. That box is in the name of Molly or Milton H. Olender, 1026 Broadway, Oakland.

Mr. Hagerty: Now, if your Honor please, I have a photostat of that record which I have shown to the Government counsel. That at this time I ask be introduced as defendant's next exhibit in order.

The Court: It may be marked defendant's Exhibit in evidence.

The Clerk: Defendant's Exhibit B in evidence.

(Safety deposit box No. 44 records received in evidence and marked Defendant's Exhibit B.)

Q. (By Mr. Hagerty): You have another record there of another box?

(Testimony of Clifford F. Carroll.)

A. I have another history card record of the safe deposit box known as Box No. 56 at the Oakland Branch, Bank of America, [273] 12th and Broadway, Oakland, and that box being dated 1/13/1943, in the name of Milton or Betty B. Olender, 1026 Broadway, Oakland.

Q. Those records indicate that there was ever a change in the names of the parties as tenants to that box?

A. There was. There was a change made on April 22, 1944. Title to box was changed to Milton Olender and Monroe Friedman.

Q. And Monroe Friedman? A. Correct.

Q. Are you acquainted or do you personally know Judge Monroe Friedman? A. I do.

Q. Is that the same man as indicated on that box, Judge Monroe Friedman?

A. I presume it would be.

Mr. Drewes: May the answer go out?

A. I couldn't say.

Q. (By Mr. Hagerty): You are not sure?

A. I couldn't say.

Mr. Hagerty: We will establish that by other evidence.

A. I couldn't answer.

Mr. Hagerty: Then at this time, your Honor, I offer in evidence a photostatic copy of that record which the Government counsel has.

The Court: It may be marked next in [274] order.

The Clerk: Defendant's Exhibit C in evidence.

(Testimony of Clifford F. Carroll.)

(Thereupon safe deposit box No. 56 records were received in evidence and marked Defendant's Exhibit C.)

Q. (By Mr. Hagerty): Could you tell from that record, Mr. Carroll, how many times the party known as Monroe Friedman entered that box?

A. No, not from this record I cannot. I cannot tell how many times it was entered from this record.

Q. I see. There are other such records in the bank?

A. There is an entrance ticket that is signed every time anyone comes in and enters the box.

Mr. Hagerty: You may cross-examine.

Mr. Drewes: No questions.

Mr. Hagerty: Do you have something further to complete your answer?

A. The signature cards—is this necessary?

Q. I don't think——

A. I believe the subpoena called for that.

Mr. Hagerty: We have photostats of both sides, Mr. Carroll (returning document to witness.) You may step down. Any further questions?

Mr. Drewes: No further questions.

(Witness excused.) [275]

ELLA WIDRIN

called as a witness by the defendant, sworn:

The Clerk: Please state your name and your address and your occupation, if any, to the Court and to the jury.

(Testimony of Ella Widrin.)

A. Ella Widrin, 431 17th Avenue.

Q. Occupation? A. I am a housewife.

Direct Examination

By Mr. Hagerty:

Q. Mrs. Widrin, are you acquainted with the defendant who sits over here? A. I am.

Q. Milton Olender? A. Yes.

Q. Is there any relationship between you at all?

A. My brother-in-law.

Q. He is your brother-in-law? A. Yes.

Q. Now at the decease of your mother did you have any business transactions with the defendant?

A. Yes. I had around \$575 of my mother's money, and I gave it to my brother-in-law, and on many occasions she says, "You know Bessie has more than—more of my money." And I don't—but I gave him \$575—around that.

Q. Do you know for what purpose?

A. Well, to be used as her funeral expenses or any way he saw [276] fit.

Q. Well, did he take care of the funeral of your mother? A. Yes.

Q. In connection with that transaction did any agents of the Internal Revenue ever talk to you?

A. Yes.

Q. And do you know who they were?

A. Well, Mr. Whiteside and Mr. Root.

Q. Do you see Mr. Whiteside here in Court?

(Testimony of Ella Widrin.)

A. I don't recognize him. It's over two years ago when they were out.

Q. The man sitting there, do you recognize him, the second man?

A. I couldn't say. It's over two years ago.

Q. Well, will you relate to the ladies and gentlemen of the jury just what conversation you had with these agents from the Bureau of Internal Revenue at that time?

A. Well——

Mr. Drewes: Objection, your Honor. No proper foundation has been laid.

Mr. Hagerty: The question here, your Honor, goes to the transaction and the money passed to the defendant which make up a part of his net worth, and an investigation was made from every avenue or source the Government saw fit to make, and I would just like to bring out the dispute over those [277] funds.

Mr. Drewes: It is inadmissible, your Honor. The witness has testified she turned over a certain amount of money to the defendant at a given time. The matter begins and ends there, unless there are similar questions to be asked of this witness.

The Court: I think counsel is entitled to elicit any conversations had with the agents.

Do you recall the conversation you had?

A. Yes. They wanted me to state the amount of money that——

The Court: You say "they." Were there two agents?

A. There were two men there.

(Testimony of Ella Widrin.)

Q. At one time?

A. At one time. And they wanted——

Q. Do you recall approximately the time?

A. Well, it must have been three years or more ago.

The Court: All right. Go ahead, counsel.

A. And they wanted me to sign a statement. They wanted to know if I would sign a statement that that was the amount that I had turned over, and I said, "Yes." So a few days later they came with a statement. There was wording in there that I didn't just understand, and it said I was signing at my own free will, which I didn't see why I should be more than willing to sign anything that I hadn't—that I hadn't said. I was willing to sign about the mother's money, but the other [278] words that they had in I didn't want to sign it. So after awhile he said, "Well, you know, I can take you down to the office."

I said, "Yes, but you can't make me say anything more than I said right here, and you can't make me sign this, because if you will record it the way I have answered," I said, "I will sign."

Q. (By Mr. Hagerty): Did you subsequently—did they leave the paper with you for your consideration?

A. No. No, they would never leave the paper in my possession.

Q. Did you offer to give them a statement that would be prepared by your attorney?

A. I sent them to my attorney and the attorney

(Testimony of Ella Widrin.)

made out the same—I still wasn't satisfied with the paper and I wouldn't sign.

Mr. Hagerty: You may cross-examine.

Cross-Examination

By Mr. Drewes:

Q. Mrs. Widrin, will you state the approximate date on which you turned over to Mr. Olender the money to which you have referred?

A. August the 24th.

Q. Of what year? A. 1945.

Q. Mrs. Widrin, when did your mother [279] die?

A. I think it was August the 23, 1945.

Q. Mrs. Widrin, state if you know whether your late mother filed income tax returns between the years 1938 and 1945?

Mr. Hagerty: Objected to as incompetent, irrelevant and immaterial. It is improper cross-examination, it is not within the scope of the direct.

The Court: Sustained.

Mr. Drewes: I have no further questions.

Your Honor, will you instruct this witness to remain in the Court? I may wish to call her at a later stage.

The Court: May I ask you to remain in Court?

(Witness excused.)

Mr. Hagerty: At this time, your Honor, I am waiting for my co-counsel. We have a witness due from Oakland. I thought he was out in the hall.

Your Honor, could we have a few moments recess? Mr. Reinhard hasn't come.

The Court: We will take the morning recess, ladies and gentlemen, at this time, a little bit earlier than usual, in order to provide counsel an opportunity to bring that witness in, and the same admonition to you not to discuss the case or form an opinion.

(Short recess taken.)

Mr. Hagerty: The defendant will call Mr. Reinhard. [280]

S. E. REINHARD

called as a witness by the defendant, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. My name is S. E. Reinhard. My home address is 1030 Ashmont Avenue, Oakland.

Q. Your occupation? A. Banker.

Direct Examination

By Mr. Hagerty:

Q. Mr. Reinhard, you are connected with the bank in Oakland, are you? A. Yes, sir.

Q. Which bank is that?

A. The Bank of America.

Q. Is that the——

A. Oakland main office.

Q. Main office at 12th and Broadway?

(Testimony of S. E. Reinhard.)

A. That's right.

Q. Are you acquainted with the defendant Milton Olender? A. Yes.

Q. About how long have you known him?

A. Oh, for approximately twenty years.

Q. Are you familiar with his reputation in the community over there?

A. I believe I am, yes. [281]

Q. What would say his reputation in the community for truth, honesty and integrity is?

A. Well, in my opinion, good.

Mr. Drewes: Objected to, no proper foundation having been laid.

The Court: Where is the basis of the objection?

Mr. Drewes: No proper foundation has been laid, your Honor. He testified he has known the defendant for a period of years. I would like to know whom he has spoken to, whom he has talked to.

The Court: That is cross-examination.

Q. (By Mr. Hagerty): The reputation is good, you say?

A. In my opinion very good, yes, sir.

Q. You know the defendant's business?

A. Yes, I do.

Q. Of what is that?

A. Well, he specializes in men's clothing, working men's clothing, uniforms, and insignia and that sort of thing for army and navy personnel.

Q. Is that a salvage type of store or——

A. No, sir, it is not.

Q. Have you counselled with the defendant in

(Testimony of S. E. Reinhard.)

various business transactions? A. I have.

Q. From time to time. You act as his banker, is that true? [282]

A. Well, to the best of my knowledge.

Q. Along about 1948 did the defendant discuss with you any tax problems he had?

Mr. Drewes: Objected to, your Honor, being improper, being outside—immaterial and irrelevant to the period in question, the years '45 and '46. I don't know what the year '48 would possibly have to do with the matter.

Mr. Hagerty: It pertains to the problems of 1945 and '46. This is a preliminary question and we will tie it in immediately with the following question.

The Court: With that assurance, I will allow it.

Q. (By Mr. Hagerty): At that time what was the conversation you had with him, what did you say to him and what did he say to you?

A. Well, to the best of my knowledge he told me he was having some difficulty with the Treasury Department, they were going over his books, and they claimed that there was a tax deficiency or that his income was more than shown on his books. So I suggested that he go to a firm of accountants in our building known as D. A. Sargent Company and that they would—that they enjoyed a very high class reputation and they could probably work out his problems for him. I also mentioned that one of the partners in the firm was a tax attorney, and I thought it would work very well in his picture.

(Testimony of S. E. Reinhard.)

Q. And did you know the man who was the tax attorney? [283] A. Yes.

Q. Do you know his name? A. Yes.

Q. What is that name? A. Mr. Ringo.

Q. Mr. Ringo. And over the years have you made loans to the defendant in connection with his business? A. Yes, sir.

Q. Have you ever made recommendations to him in reference to investments? A. I have.

Q. Specifically have you ever recommended the transfer of cash balances into Government bonds?

A. I have.

Q. Can you recall the conversation on that particular subject?

A. No, I can't recall any conversation, but it was during the war loan drives. I happened to be chairman of the War Loan Drives in Alameda County, and naturally I wanted to see as many bonds sold for the war effort and also to build up our quota in Alameda County. So I not only spoke to Mr. Olender, I spoke to thousands of other people regarding investments in the Government bonds at that time.

Q. In your function as a banker is it your duty to examine net worth statements and [284] prepare them? A. From time to time, yes.

Q. For purposes of loans? A. Yes.

Q. The defendant, Mr. Olender, has some trustee accounts in your bank, is that true?

A. Well, I wouldn't say for sure. I believe he has, yes.

(Testimony of S. E. Reinhard.)

Q. Such accounts as that would you consider in a net worth statement, would you permit him to put such accounts in a net worth statement?

A. Trustee accounts?

Q. Yes. A. No, sir.

Q. They would not be proper? A. No, sir.

Q. Not in a net worth statement?

A. No, sir, it would not.

Q. Would it be proper for him to include the bank accounts in his wife's name?

Mr. Drewes: I am going to object.

Q. (By Mr. Hagerty): In a net worth statement.

Mr. Drewes: The witness has not been qualified as an accountant. He stated he is a banker. I can't see where his opinion as to what should or should not be included in a net worth statement is material.

Mr. Hagerty: A banker is an expert in the making of [285] loans.

The Court: Overruled. You may answer.

A. What was the question, please?

Q. (By Mr. Hagerty): I will withdraw the pending question and rephrase it. In preparing a net worth statement for a man to get a loan or in your function as a banker, would you consider among his assets a bank account in his wife's name?

A. No, sir.

Q. You would not? A. No, sir.

Q. Now further along that line, in connection with net worth statements would you say that a man should show on a net worth statement the stock in

(Testimony of S. E. Reinhard.)

an insolvent corporation as part of his net worth?

A. Well, if it had no value there would be no reason to put it in a net worth statement.

Q. In your conversations in transactions with Mr. Olender did he ever ask you to conceal any of the transactions? A. No, sir.

Mr. Drewes: Objected to, your Honor, as calling for hearsay testimony.

The Court: Overruled.

Q. (By Mr. Hagerty): I show you Government's Exhibits 30, 31, 32, and 33, which are U. S. Treasury Forms prepared by your bank. I guess they are familiarly known as P.C.R. [286] forms. That is, they relate to cash transactions. Do you recognize that type of form? A. Yes, sir.

Q. Those forms were prepared by your bank, can you tell?

A. Well, the forms are furnished us by the Federal Reserve or the Treasury Department and we fill them in as the currency transactions occur.

Q. The forms are to be prepared, are they, on all large cash transactions?

A. On any cash transaction of a thousand dollars or more. That was the law at that time.

Q. Would you have any idea, Mr. Reinhard, about how many of those forms you would prepare in the average week of business during the period of, say, 1945-46?

A. Well, my guess would be about 25 or 30 such forms a week, that is for the branch.

Q. For your branch alone?

(Testimony of S. E. Reinhard.)

A. For the particular branch, yes, sir.

Q. Then necessarily you would prepare forms of this type on many of your depositors, is that right?

A. On all cash transactions that were not in the course of the regular line of business. That is, if one of the larger stores came in and made a larger currency deposit, why, that wasn't necessary to make a report on that type of form. But on any individual that came in and made either a [287] cash deposit or a cash withdrawal of a thousand dollars or more, we made up such forms.

Q. You say that you prepared about 25 or 30 a week?

A. Well, that is a rough estimate. It might be fifty.

Q. You probably have close to 1500 a year then in that period of time. Of all those that were prepared did any of them result in tax prosecution cases, do you know?

Mr. Drewes: Immaterial, your Honor.

The Court: Sustained. Objection sustained.

Q. (By Mr. Hagerty): In connection with the preparation of those forms, Mr. Reinhard, were you ever subpoenaed into a trial like this?

Mr. Drewes: Same objection.

The Court: Sustained.

Mr. Hagerty: You may cross-examine.

(Testimony of S. E. Reinhard.)

Cross-Examination

By Mr. Drewes:

Q. Mr. Reinhard, you testified as to certain aspects of net worth statements. You asked for and received a number of net worth statements, I suppose, in the course of a year at your bank?

A. Correct.

Q. For what purpose do you ask for and receive such statements? A. For loaning purposes.

Q. For loaning purposes?

A. That's right, credit purposes. [288]

Q. And the purpose is to apprise the bank of the financial resources and background of the applicant? A. That's right.

Q. Is that correct? A. Yes, sir.

Q. In the preparation of a net worth statement would you include the bank account of a wife of the borrower if the funds in fact belong to the borrower? A. Include—I don't quite get that.

Q. You testified that in a net worth statement the bank account of the wife would not be included?

A. That's correct.

Q. If the funds in that bank account in fact belonged to the borrower, would they be included in the net worth statement?

Mr. Haggerty: Objected to, your Honor, as assuming facts not in evidence.

Mr. Drewes: It is a hypothetical question asked of this man who is an expert witness, a banker of many years background. I believe I can ask the same question.

(Testimony of S. E. Reinhard.)

The Court: Overruled.

Mr. Hagerty: I will withdraw the objection.

A. Not as far as the bank is concerned, no. In other words, if a savings account or a commercial account is in another's name, that is not considered in our opinion as any [289] asset of the borrower.

Q. (By Mr. Drewes): Wouldn't you want to know if the borrower had assets in the names of his wife or other persons?

A. Only if she was going to sign the note. In a great many cases we insist that the borrower and his wife both sign the note. In that case, why, we would insist on knowing her assets.

Q. Are you familiar with the measurement of income over periods by use of the net worth approach or system? A. Well, vaguely, yes.

Q. Would you explain your understanding of that accounting method of determining income?

Mr. Hagerty: Well, if your Honor please, I will object to this as improper cross-examination. It is outside the scope of the direct.

The Court: Overruled.

Mr. Hagerty: And there is no proper foundation laid, as a further objection.

The Court: Overruled.

A. Well, it is the usual habit—practice for all borrowers at the bank to file a financial statement with the bank each year, and those statements when they come in each year are gone over and we see the difference in net worth in the individual state-

(Testimony of S. E. Reinhard.)

ment, and our credit is extended entirely on the current financial statement. [290]

Q. (By Mr. Drewes): Yes. I understand that, Mr. Reinhard, but that was not my question. Let me rephrase it. It is true, is it not, that accountants often measure income by making a comparison of an individual's net worth as of two periods of time?

A. I believe so, yes.

Q. And there is a difference, is there not, between the net worth statements as prepared for that purpose and the net worth statements as prepared, for example, by a banker to determine a person's aggregate wealth at one period of time?

A. Yes, sir.

Q. Would you explain the difference between them? A. Well——

Q. I will withdraw the question. Let me ask you this. Is it not true that the net worth of an individual from a banker's point of view seeks to determine his total assets and liabilities and the value thereof as of a given date; whereas when an accountant uses a net worth approach, he is interested in determining the amount of his income derived by the individual between two successive dates, is that correct? A. That is correct.

Q. And in the case of the banker, the cost price of assets acquired is of no particular significance; it is their present value, is that not correct? [291]

A. That's right.

Q. Whereas with respect to the measurement of income by comparing net worths at two specific

(Testimony of S. E. Reinhard.)

dates, just the reverse is true, the present value of the assets is of very little interest, it is the cost price that is important, is that not correct?

A. You mean from the accountant's standpoint?

Q. Yes. A. Yes.

Q. Is that correct? A. Yes.

Q. And therefore, Mr. Reinhard, if funds were held by a taxpayer in a trustee account and it was shown that the source of the funds were from the earnings or other income of the taxpayer, then that would be included by the accountant in determining his income by the net worth method, is that not correct? A. That's right.

Q. And consequently in the same manner there might be funds in the bank account of a taxpayer's wife and his children, in the names of his children or in the names of other relations, and if it were shown that the source of those funds were from the earnings or income of the taxpayer, that likewise would be included in the net worth statement?

A. Not for loaning purposes. [292]

Q. Not for loaning purposes. That wasn't my question. I said likewise from the point of view of the tax accountant who is measuring income by the net worth statement?

A. You are referring to the bank, now?

Q. No, I am referring to the tax accountant or other accountant who seeks to measure income by comparing net worth statements, and my question was if it was shown that the source of the income in a wife's or child's account was the earnings or other income from the other income of the taxpayer,

(Testimony of S. E. Reinhard.)

wouldn't those bank accounts be included in the net worth statements of the taxpayer?

A. Well, I am not a tax accountant.

Mr. Hagerty: Just a minute. I will object, your Honor, on the grounds that this is invading the field that the witness is not necessarily qualified to answer. It calls for speculation and conjecture on his part, and furthermore the question, repeated so many times in this vein, ceases to become a question and becomes an argument.

Mr. Drewes: The defendant offered the witness as an expert, your Honor. He has answered certain questions with respect to what should or should not—

The Court: He may have answered it before. However, I will allow him to answer. I think you have covered the ground pretty well.

Will you repeat the question? [293]

(Question read by Reporter.)

Mr. Hagerty: I will object on the further ground, your Honor, that it is compound and ambiguous.

The Court: Overruled.

A. My answer would be, yes.

Q. (By Mr. Drewes): Mr. Reinhard, if a net worth statement were being prepared by an applicant for a loan at the bank as of the 31st day of December, 1946, and it subsequently appeared that on the 31st day of December, 1947, a certain number of shares of a corporation had become worthless,

(Testimony of S. E. Reinhard.)

how would you treat the item as of the last day of December, 1946?

A. As of the date the statement was submitted?

Q. Let me rephrase my question. The net worth statement is being prepared as of the last day of the year of 1946.

A. Yes.

Q. Subsequently, however, on the last day of the following year, 1947, the stock had become worthless. How should that item be covered on the net worth statement as of December, 1946?

A. Well, it shouldn't be carried as the value as of that time.

Q. As of 1946? A. Correct.

Q. That was for bank purposes?

A. Correct. [294]

Q. You have testified, Mr. Reinhard, that you have known the defendant for how long?

A. Approximately 20 years.

Q. Approximately 20 years? A. Yes.

Q. Had you heard, Mr. Reinhard, that in March of 1944 the United States District Court for the Northern District of California enjoined Milton Olender from selling sailor suits at prices in excess of the permissible prices under the Price Control Act in force and effect at that time?

Mr. Hagerty: I object to that question, your Honor. I cite it as misconduct. It is highly prejudicial, and I ask for a mistrial.

The Court: The objection is sustained. The question is stricken from the record and the jurors

are requested to ignore the question. Motion for mistrial is denied.

Mr. Drewes: No further questions.

Mr. Hagerty: Thank you, Mr. Reinhard. No further questions.

The Court: The witness is excused.

(Witness excused.)

Mr. Hagerty: At this time, your Honor, by and with the stipulation of Government counsel I would offer into evidence an affidavit of Judge Monroe Friedman and ask that it be marked as the defendant's Exhibit next in order. [295]

The Court: May I see it, please?

By stipulation this may be marked in evidence.

Mr. Drewes: So stipulated.

The Court: So ordered.

The Clerk: Defendant's Exhibit D in evidence.

(Thereupon affidavit of Monroe Friedman was received in evidence and marked defendant's Exhibit D.)

Mr. Hagerty: And at this time, your Honor, may I read it to the Jury?

This is an affidavit of Judge Monroe Friedman. It was signed the 13th day of September, 1948, before Howard H. Desky, a notary public in and for the county of Alameda, State of California. The affidavit is to this effect:

“Monroe Friedman, being first duly sworn, deposes and says: That ever since the year 1920 I have been and now am an attorney at law, duly and

regularly licensed to practice law before all the courts of the State of California; that ever since the year 1930, I have been and now am duly and regularly licensed to practice before the United States Supreme Court.

“That I have known Milton Olender for over thirty years; that I first knew him when we were both students at the University of California at Berkeley, California; that from 1940 on, I represented [296] him on a few occasions in some legal matters.

“That in the beginning of April, 1944, Olender called at my office and stated that he and his family were planning to go to Texas later in the month to visit his son who was in the United States Army and stationed in Texas; that he wanted me to have access to his safe deposit box during his absence, and to take care of any matters that might arise in his business during his absence.

“That on April 22, 1944, I met Olender by appointment at the Bank of America, National Trust & Savings Association, 12th Street and Broadway, Oakland, California; that on that day, safe deposit No. 56 in said bank was transferred from the names of Milton Olender and his wife to the names of Milton Olender and Monroe Friedman; that I went in with him to look at the safe deposit box itself; that Olender opened it in my presence; that there were several papers and some bonds in the box, and also over \$70,000 in United States currency; that Olender gave me the key to said box.

“That on May 5, 1944, after Olender had re-

turned from Texas I again met him at the same bank by appointment, and the same safe deposit box was transferred back to the names of Mr. and Mrs. Milton [297] Olender; that on that day, Olender opened the said box in my presence, and the contents were the same as on April 22, 1944; that I then returned the key to said box to Olender; that I did not open the said box at any time between April 22, 1944, and May 5, 1944, and that said two occasions were the only times that I ever saw the said box or any contents thereof."

And it is signed by Monroe Friedman.

If your Honor please, may I pass this to the jury for their examination?

(Thereupon Exhibit D was passed to the Jury.)

Mr. Hagerty: At this time I call the defendant Milton Olender.

MILTON H. OLENDER

the defendant herein, being first duly sworn, testified as follows:

The Clerk: Will you please state your name, your address and your calling to the Court and to the Jury?

A. Milton Howard Olender, 121 Alpine Terrace, Oakland. I am the sole owner and proprietor of the Army and Navy Store in Oakland.

Q. Should I put "merchant" as your occupation?

A. Merchant.

The Clerk: Thank you. [298]

(Testimony of Milton H. Olender.)

Direct Examination

By Mr. Hagerty:

Q. Mr. Olender, where were you born?

A. San Francisco.

Q. Give the ladies and gentlemen of the jury the date?

A. December 6th, 1895, in the Mission District.

Q. Then your early education, where was that, spent here?

A. I went to Old Lincoln Grammar School on 5th Street across from the Mint before the earthquake. After the earthquake I went to Hamilton Grammar School, Henry Durant Grammar School, Hearst Grammar School, and graduated from Fremont, which is still out on McAllister Street. I then went to Lowell High School on Sutter Street, in the old building, and then went over to the new one, the one still out on Haight Street. I graduated from there in 1914. I then went to the University of California and graduated from there in 1918.

Q. What business was your father in?

A. He was a merchant, men's and women's clothing.

Q. And did your mother assist him?

A. Yes, very much.

Q. Did you yourself work with them?

A. Yes, ever since I was eleven years old.

Q. Following your graduation from the University of California, what did you do?

A. Well, immediately after graduation I went

(Testimony of Milton H. Olender.)

to work in the [299] shipyards, the Union Works in San Francisco, in the yards. I was 1-A in the draft, and was not called.

Q. That was in—— A. 1918.

Q. 1918.

A. In November, the 11th, when the war was over, about a week later I went to Fresno and went to work with my father, and later went over to my store that was given to me.

Q. What was the name of the concern of your father's?

A. The store that my father—my father had two stores, one in the Olender Building at 1820 Tulare Street. It was known as the Economy Department Store. The other store, across the street, was Olender's, and later was changed to Milton Olender's.

Q. How long had your father been engaged in business there in Fresno? A. From 1908 on.

Q. 1908 on. How many stores did he have?

A. Two stores.

Q. Two stores? A. At one time three.

Q. At one time three. And where were they located there, do you know?

A. Well, the first store was 1820 Tulare. The first store was 1833-35-37 Tulare, and then when they built the Olender Building in 1918 they moved over there. They had two stores, [300] rather, the Economy Store—he also owned the store—Harry Coffee's, which is still in Fresno, and sold it to Mr. Harry Coffee.

(Testimony of Milton H. Olender.)

Q. After you returned from school did they set you up in business for yourself?

A. Yes, they did. In 1920.

Q. In what store?

A. They gave me the 1833-35-37 store. My father and my uncle both owned that store and they turned it over to me and they ran their own store across the street.

Q. You speak of 1833-35-37—you have reference to street numbers, do you? A. Yes.

Q. What street? A. Tulare Street.

Q. Tulare Street. Is that the location of the Olender Building?

A. 1820 Tulare Street, across the street.

Q. Across the street? A. Yes.

Q. Did your father also own a hotel there?

A. Well, the hotel is in the building. He did not own the hotel. The hotel was leased.

Q. I show you, Mr. Olender, a series of photographs and ask you if you recognize them? [301]

A. I do.

Q. What are they?

A. They are pictures of the exterior of the Olender Building in Fresno and also the interior upstairs and downstairs, the first floor and the basement, and they are pictures of the vault.

Mr. Hagerty: I would like to offer these in evidence, your Honor, as the defendant's next in order.

Mr. Drewes: Objection, your Honor. They are immaterial, irrelevant. Furthermore, no proper foundation.

(Testimony of Milton H. Olender.)

Mr. Hagerty: I make the offer, your Honor, to show the acquisition of assets by the father and the corpus that came to the defendant through inheritance. That set up the original——

The Court: They may be marked for identification.

The Clerk: Defendant's Exhibit E for identification only.

(Thereupon the photographs were marked for identification only, defendant's Exhibit E, as a collective exhibit.)

The Court: When were these photographs made?

A. 1948 or 1949.

Q. (By Mr. Hagerty): These photographs were made following the death of your father, is that right?

A. Yes.

Q. And prior to the death of your mother? [302]

A. Yes.

Q. These photographs only show the Olender Building interior and exterior?

A. Yes.

Q. Do they show the store that you first started with?

A. They show the store I first worked in but not the store that I owned. The store that I owned is across the street from there.

Q. What was that street address?

A. 1833-35-37 Tulare Street.

Q. And this Olender Building is on the even side of the street, is that right?

A. Yes.

Q. When you went into this store of your own,

(Testimony of Milton H. Olender.)

when was that about—can you fix the time?

A. Either late in 1919 or very early in 1920.

Q. Do you have any idea of the approximate inventory in that store when you took it over?

A. It was in excess of \$50,000.

Q. In excess of \$50,000. Now, how long did you have that store? A. Till about May, 1923.

Q. Till about May of 1923. And what would you say had been your success or failure in business there, what had been your results? [303]

A. It had been very successful.

Q. The income from that store, did you get—did you keep it or—

A. The funds of the store—the store was given to me to do as I pleased with it, and they told me to reduce the inventory as low as I wish. They actually wanted to get rid of that store finally because they wanted to—wanted to take me over into the other store and put me in full charge of that and give me that one, but we had two places and they just didn't want to. In other words, we were in competition with ourselves.

Mr. Drewes: Objected to and ask that the answer go out as not responsive, your Honor.

The Court: Overruled.

Q. (By Mr. Hagerty): And then how did you happen to leave that store?

Mr. Drewes: Objected to, irrelevant, immaterial. The entire line of the examination seems to have no bearing whatsoever on the issues now before this jury.

(Testimony of Milton H. Olender.)

The Court: Overruled.

A. Well, you stated in your opening statement I had been going with a young lady who later became my wife, the mother of my children, and my parents objected very strenuously.

Q. (By Mr. Hagerty): Speak a little louder, Mr. Olender.

A. My parents objected very strenuously. There was an [304] additional objection which you didn't mention and which has proved a very great blessing to me. My wife had been married before and had a son about three years old, and I have raised that son and he is a most devoted son to me.

Q. Your family objected to your wife on religious grounds?

A. And the fact that she had been married and had a son.

Q. So what was the result, what did you do?

A. Well, it got pretty tough—was a constant wrangle. They also were of the opinion, as many parents are, that the woman I married is “after our money.” I said, “If you think that is the case, you can have your money, you can have your business, I am going out on my own, and just take it back.”

Q. So you severed relationship with your father in that store, is that true? A. That's right.

Q. What did you do in severing the relationship; did you give back the money? [305]

A. I had given Jim considerable money prior to that time and at the time of my leaving there was \$6,000 in my bank account and I wrote checks out

(Testimony of Milton H. Olender.)

for that and turned that over to him, leaving, I think, something like 94 cents in the bank at the time.

Q. And then what did you do?

A. I went to work for the Euleess Realty Company, a real estate firm next door to my father's store.

Q. Would you just give a rapid rundown of what you did then for the next four or five years? You got married in the meantime, didn't you?

A. Oh, yes—no, I went to work for the Euleess Realty Company first. After leaving, and in 1924, I got married. A year later, April—or July 28, 1924, and I had left the firm Euleess Realty Company.

Q. You will have to keep your voice up because I'm afraid—

A. I'm sorry. I left the firm of Euleess Realty Company and worked for many different concerns. I believe I came up to San Francisco and worked for Hanson and Elrich, an old established furnishings goods firm at Third and Market.

Q. Would it be fair to say, Mr. Olender, that for the next three or four years then you worked as an employee in various dry goods concerns, is that right? [306]

A. That's right.

Q. Did you return to the employment of your father at any time?

A. Just prior to that I had been the manager of the men's department in Raydon and Kemps store in Fresno, the largest department store there

(Testimony of Milton H. Olender.)

at the time, and my father had repented pretty much by that time. I had a son a couple of years old, and he said, "Milton, why don't you come back. I will open the economy store for you, put you back in there on the same status that you were before."

Q. Where was that store?

A. That's the 1820 store.

Q. 1820 store? A. Yes.

Q. That's the one that is represented in the picture? A. In the pictures.

Q. By these photographs, is that true?

A. That's right.

Q. Is that located in what is known as the Olender building? A. It is.

Q. That building belonged to whom?

A. It belonged to my father and my uncle, but during the years 1919 until the day of my marriage my father and uncle, [307] who had supreme confidence in me, made me the trustee of that building, and the building was entirely in my name. I signed all leases and transacted all business of the building.

When I got married, along with the cash that I turned over to my father, I voluntarily revoked the trusteeship.

Q. In other words, that trusteeship antedated your marriage? A. Yes.

Q. Are there any other business establishments in that building than the store?

A. At that time there was a grocery store and men and women's clothing store run by a Mr. Bidegary, who was a sheep man whose sole business

(Testimony of Milton H. Olender.)

was just with the sheep people around the valley there. He was no competitor at any time of ours, just had his own personal trade, and there was the hotel lobby and the hotel and just the large store, the 1820 store.

Q. Well, you returned to the store in what year?

A. I believe it was 1926.

Q. And then will you tell his Honor and the ladies and gentlemen of the jury what happened next?

A. Well, when I originally opened the first store I had opened it because again, as you stated in your opening [308] statement, I decided to run the store on modern principles the way I wanted to run it and not on the old fashioned principles that had been antedated by that time or antiquated.

Q. What is that word that you used—what is that word that you call that type of store, that your father had?

A. Get what you can get?

Q. What?

A. I think it was get what you can get.

Q. Did you say "Schlock" store?

A. Well, yes.

Q. What does that mean?

A. That term is used—in the early days stores did not mark merchandise, there were no O.P.A.s or O.P.S.s in those days and you had a secret code on your merchandise and the customer came in and you asked him a price for the item and if he looked like he could pay it, why, he would get it, and if he didn't want to pay it, why, he would get somewhere

(Testimony of Milton H. Olender.)

down to the point where you still made a profit but you sold it. But there was no set price and I wasn't built that way. I want the store to be run on proper principles, all merchandise marked, nobody to pay any more or any less than anybody else and I took no offers in my business. When a price is set, that was [309] it and I didn't accept anything else.

Q. Well, now, did that bring you in conflict again with your father?

A. Yes, it did. When I went into that store it was with that understanding, my father and uncle both came back there to help me and I said, "I want to establish a one-price store, and the first time I see a price cut in this store I am going to walk out," and that is exactly what I did.

Q. I show you a series of checks, Mr. Olender, and ask you if you can identify them?

A. I do.

Mr. Hagerty: At this time, your Honor, we ask that these checks be marked for identification until they can be identified.

The Court: As one Exhibit?

Mr. Hagerty: Yes.

The Court: They may be marked as one Exhibit for identification.

The Court: It is about the noon hour, Mr. Hagerty.

Mr. Drewes: If your Honor please, if we are going to take the noon recess, may I address the Court very briefly in the absence of the jury?

The Court: Certainly.

The Clerk: Defendant's Exhibit F for identification only. [310]

(Group of cashed checks for identification only, Defendant collective Exhibit F.)

The Court: Do you have any other exhibits for identification?

Mr. Hagerty: No, not at this time.

The Court: Ladies and gentlemen, we will take the noon recess and resume at two-thirty this afternoon, with the same admonition not to discuss the case or form an opinion until the matter is submitted to you.

Two-thirty this afternoon.

I wish to hear from counsel.

(Following proceedings heard outside the presence of the jury.)

Mr. Drewes: If your Honor please, several days ago Mr. Lewis advised me in the course of conversation that he had intended to subpoena a character witness other than the gentleman who appeared this morning. As far as I know he still intends to do so. And it is for that reason that I bring up the subject of your Honor's ruling this morning. The offer made, the question asked was asked, I assure the Court, in good faith. It seems to me that questions as to whether or not an individual has been enjoined from violation OPA regulations in 1944, during the war years, has a direct bearing on reputation.

The witness testified that he knew the reputation and it was good. The question asked of him did

not enlighten [311] knowledge of his reputation as to any particular trait, just his reputation in general. Now, the violation for which the defendant was enjoined by this honorable Court in 1944 is precisely the type of transaction concerning which a considerable amount of evidence has already been put into the record in this Court. The law on the subject, as I understand it, is essentially that the trial court should have the broadest discretion, and the nature of the testimony, it must be necessarily controlled, but I submit, your Honor, that when the defendant on the particular facts which are now in evidence in this record submits to this jury the issue of his reputation, then most certainly the government should have the right to question character witnesses concerning their knowledge of any transactions which I say are closely not only in time but in nature related to those which are already in the record that have bearing on his reputation in that community.

The Court: What was the precise form of your question?

Mr. Drewes: I asked, as I best recall it, your Honor, whether or not that witness knew that the United States District Court for the Northern District of California had in March of 1944 enjoined the defendant for selling suits at prices in excess of those that were then [312] permitted by the law. That is to the best of my recollection the question that I asked. I submit, your Honor, that your Honor will reflect——

The Court: What have you to say?

Mr. Drewes: —in those years during the war there was a considerable amount of publicity given to these enforcement—a tremendous amount of publicity given to the enforcement of the OPS.

The Court: Many complaints were filed and some went to judgment and others did not go to judgment.

Mr. Drewes: This one went to judgment.

The Court: Is there a judgment in existence?

Mr. Drewes: There is a judgment in existence.

Mr. Hagerty: As I understand it, your Honor, he was represented at that time by Monroe Friedman, and I understood he came out successfully in it.

The Court: Do you have the records on that?

Mr. Hagerty: By inference that infers a violation, a crime, a misdemeanor, which is, as counsel well knows, prejudicial to bring up in an action like this, and it is done only for one purpose, to smear the defendant.

Mr. Drewes: Your Honor, in the leading case——

The Court: Do you have any precise authority on the subject? I would like to examine the record, if there is a record. Would you leave it with the clerk of my [313] Court?

Mr. Drewes: Would the clerk be kind enough to get the file in number 22932 G?

The Court: Do you have a record of this?

Mr. Drewes: Yes.

The Court: Let me see it. I will examine it during the noon hour.

Mr. Drewes: If your Honor please, as I recall

the leading case on the subject is in 335 U. S. I believe it is the Michaelson case. However, I will get that citation for you and give it to your law clerk.

The Court: Authorizing on cross-examination reference to any such judgment in a matter of this character?

Mr. Drewes: To that precisely, and, your Honor, I don't recall having seen such. I will attempt to find one. I will examine the authorities for that purpose.

The Court: As illustrative in the form of the stipulation under this second paragraph, as bearing upon the production of this subject matter:

“Whereas the defendant claims that the said violation as set forth in the said complaint was unintentional on his part, and the parties hereto desire to avoid the time and expense of proceeding to trial in said action and the plaintiff and defendant, and each of them is, willing that in full settlement of any and all violations which might have [314] occurred subsequent to the effective date of the said regulation and up to and including the date of filing said complaint that a decree may be entered in the form annexed hereto enjoining the defendant from all further violation.”

There were many forms of judgment entered into, as I recall, during those years and I think you may well be bordering upon error in questioning the character witness as to the truth, honesty and integrity of a man in a community wherein he resides in making reference to a judgment of this character.

However, I am always open to further argument, in case I am incorrect I will revise my thinking on the subject.

Mr. Drewes: I just want to state in that connection, your Honor, that we are dealing here with reputation, not with the truth of the allegations which are made. The law is that they may be made in good faith——

The Court: Let us analyze your position. The defendant is charged with felonious conduct in this case, and he produces a witness, a banker from Oakland, who testifies as to his truth, honesty and integrity, that being the trait involved in the community wherein he resides. He said as far as he knew it was all right.

Mr. Drewes: He said only reputation.

The Court: Reputation. All right. On cross-examination [315] you alluded to a complaint for injunctive relief which was filed by the government through Mr. Bowles, the price administrator, and a stipulation for judgment. This is a civil matter, bear in mind.

Mr. Drewes: And a judgment——

The Court: This is a civil matter.

Mr. Drewes: That's correct.

The Court: As you may recall, and as the Court recalls, many of these matters (not all of them perhaps) but many of them were the result of unintentional conduct on the part of an individual as illustrative of the defendant here, and the defendant here in the stipulation refers to "unintentional" conduct on his part, and so forth and so on. Now it

may be that it is a borderline situation—I view it——

Mr. Drewes: I prefer not to prejudice the record, your Honor, by making——

The Court: I have tried the cases on the theory that: What does it profit that the government or the defendant if they press upon the Court that which hereafter results in reversible error. Much money is spent by the government in these cases and much money is spent by defending in a case, and I consider it a borderline situation fraught with difficulties and open to much argument. If I were presenting the case, I wouldn't press it upon [316] any Court. However, if you do, and you submit authority, I will review the authority and I will reserve my ruling.

(Thereupon the afternoon recess was taken, until two-thirty o'clock p.m.) [317]

September 21, 1952—2:30 P.M.

Mr. Hagerty: At this time, with the Court's permission, we desire to put on a short witness out of order.

Mr. Lorenzen, will you take the stand, please?

HIRAM A. LORENZEN

called as a witness on behalf of the defendant, sworn.

The Clerk: Please state your name, address and occupation to the Court and to the jury.

A. Hiram A. Lorenzen, 710 Walla Vista Street, Oakland, California.

(Testimony of Hiram A. Lorenzen.)

Q. Occupation?

A. I am secretary-treasurer of Money Back Smith Company.

Direct Examination

By Mr. Hagerty:

Q. What is the Money Back Smith Company, Mr. Lorenzen?

A. It is one of the largest men and boys clothing stores west of Chicago, as we advertise.

Q. Where is it located?

A. At 12th and Washington Streets.

Q. 12th and Washington Streets?

A. In Oakland.

Q. In Oakland? . A. Yes.

Q. You are employed there as the secretary-treasurer of [318] that corporation?

A. That is correct.

Q. Are you acquainted with the defendant, Milton Olender? A. I am.

Q. How long have you known him?

A. About 25 years.

Q. Have you had occasion to do business with Mr. Olender? A. Yes, I have.

Q. What would you say is his reputation in that community over there for truth, honesty and integrity? A. I think it is the best.

Q. What business transactions has your concern had with Mr. Olender?

Mr. Drewes: Objected to as immaterial, irrelevant.

(Testimony of Hiram A. Lorenzen.)

Mr. Hagerty: It is preliminary, your Honor, to show again bearing on the net worth and expenditures methods, the net worth and various expenditures that were made during the course of the years, in question, '45 and '46.

Mr. Drewes: I don't understand, your Honor, what transactions in connection with net worth.

Mr. Hagerty: It is a little bit involved but I can show——

The Court: I will permit you to go ahead, but I will grant motion to strike it if it appears to be irrelevant. I can't thus far see the reason but I will [319] let you go ahead.

Mr. Hagerty: These transactions will later be reflected in our books.

The Court: All right.

Q. (By Mr. Hagerty): Directing your attention to, say, the year 1944, Mr. Lorenzen, did you have any transactions with Mr. Olender, your concern?

A. Yes, we did.

Q. What were the nature of those transactions?

A. Well, they were sale of surplus merchandise or merchandise that we could not sell in our own store, that we didn't want to sell in our own store, because of the type of merchandise that it was at that time.

Q. And Mr. Olender bought these goods from you, did he? A. He did.

Q. Do you know the method of payment for these goods?

(Testimony of Hiram A. Lorenzen.)

A. Well, he paid in cash most of the time for them.

Q. Now these goods he bought, was there more than one occasion when he bought goods from you?

A. Oh, yes, quite a number of occasions.

Q. A number of occasions? A. Yes.

Q. Directing your attention to the years '44, '45 and '46. A. That's correct.

Q. During that period of time? [320]

A. Yes.

Q. And would you have an idea as to about the size of the lots of goods he bought, how much they were?

A. They amounted to four, five hundred dollars.

Mr. Hagerty: No further questions in this respect at this time.

Mr. Drewes: Your Honor, may the question and response be stricken with respect to the transactions between himself and the defendant?

The Court: You say you have reference to this at a later stage of the trial?

Mr. Hagerty: Yes.

The Court: I will reserve my ruling.

Mr. Hagerty: I will tie them through the defendant and his books.

The Court: Are you finished with this witness?

Mr. Drewes: Yes. I have no questions.

Mr. Hagerty: You may cross-examine.

Mr. Drewes: I have no questions.

The Court: This witness is excused.

(Witness excused.)

Mr. Hagerty: Mr. Olender, will you resume the stand, please.

MILTON H. OLENDER

having been previously sworn, resumed the stand and testified [321] further as follows:

Direct Examination

(Resumed)

By Mr. Hagerty:

Q. Mr. Olender, I again show you defendant's exhibits F and F-1, four pages of checks, Defendant's Exhibits F and F-1 for identification, and ask you if you can tell his Honor and the ladies and gentlemen of the jury what those checks represent, what payments they represent?

A. Those checks represent payments on my checks with my name printed on the side, signed by me to my father, my uncle, and to the partnership of my father and my uncle, in the years 1920 and '21.

Q. What is the total, what is the total of the payments? A. Very close to——

Mr. Drewes: Object—don't answer, please, Mr. Olender. I object, your Honor, on the grounds that the documents have not yet been put into evidence.

Mr. Hagerty: I will offer them in evidence.

Mr. Drewes: I will object, your Honor, on the grounds they are remote, irrelevant and immaterial. I see no point in cluttering the records.

Mr. Hagerty: I offer them in evidence, your Honor, to prove the inception of the net worth of

(Testimony of Milton H. Olender.)

this defendant. He had the store and the difficulty arose between him and his father, and he gave back—he had been giving back [322] the money—he gave the whole thing at once back and left the store, although it was money that belonged to him, and it totals approximately \$40,000.

Mr. Drewes: That is 1921?

Mr. Hagerty: At the inception of his net worth it runs right down to date.

The Court: Do you expect to incorporate any of these items in a statement to be submitted on behalf of the defendant, is that your point?

Mr. Hagerty: Well, later through the accountant we will establish and trace his net worth from the beginning.

The Court: As of what base period?

Mr. Hagerty: Well, it will come back through the funds that his father gave him and this \$75,000 in cash that he brought up from Fresno at the death of his father and put in his safety deposit box in Oakland.

The Court: This item here in 1920, '21, would have no relevancy to the items you speak of.

Mr. Hagerty: Yes, it shows the source of the funds. He earned this money in operating this store, and when the religious difference—

The Court: But, counsel, if you will pardon my interruption, if he relinquished any claim to these funds in 1920, '21, and if the checks represent funds he [323] transferred back to his uncle and his father or both members as the copartnership, and

(Testimony of Milton H. Olender.)

the transactions were closed, how would they have any legal or logical relevancy to the transactions in 1943, '44, '45, '46?

Mr. Hagerty: Because his father stood in abeyance on the subject, and always said, "Well, it's Milton's money, I am going to give it back to him." In other words, there was never a full acceptance of the funds in the whole sense of the word by the father, and this is the basis of Mr. Olender—Milton Olender, the defendant, start in business.

Mr. Drewes: If your Honor please, you will recall that the Government put into evidence a net worth—an exhibit showing that the defendant's net worth as of 1941-1947, as prepared by the defendant's accountant, so I see no useful purpose in going back beyond that period. It is very remote and tenuous and simply encumbers the record and takes us off on a side venture.

The Court: That is true, but after the defendant is entitled to explain on the net worth breakdown items of cash in the amount of—May I have my file folder, Mr. Clerk—items of cash which are in dispute. The items of cash are in dispute, are they not?

Mr. Hagerty: Yes, your Honor, they are in dispute, and in particularly the amounts which were in the safety [324] deposit box in Oakland which had their origin really in these transactions.

The Court: This defendant claims, as I understand your intention, your argument, that large

(Testimony of Milton H. Olender.)

amounts of cash were received from his father's estate.

Mr. Hagerty: That's right.

The Court: Now you desire to show——

Mr. Hagerty: And from his father during his lifetime. The father died in 1942.

The Court: You desire to show motivation and consideration?

Mr. Hagerty: Yes, your Honor.

The Court: Antedating the transaction wherein moneys were given to this man?

Mr. Hagerty: That is true.

The Court: About his father or his mother, is that true?

Mr. Hagerty: That is true.

The Court: For that purpose I will allow these checks in evidence. They may be marked.

The Clerk: Defendant's Exhibit——

The Court: One moment. Before allowing these checks, I would like to permit the United States Attorney's office to examine on these checks. You may if you wish. These checks are made to various persons. [325]

Mr. Hagerty: Those are the checks, your Honor. Your Honor, the reason we show those is to show that—that one your Honor picked there—is to show that this defendant was paying the bills, and the other checks that he has given during that period of the——

The Court: There isn't any dispute on that, is there, that he was acting in that capacity?

(Testimony of Milton H. Olender.)

Mr. Hagerty: We thought there might be so we put them in to cover both sides.

The Court: There is another group here.

Mr. Hagerty: I might ask the defendant another question. Do those checks represent all the payments you made to your father and to your uncle? A. No, sir, they do not.

Mr. Drewes: It may be a misunderstanding here, your Honor. Do I understand that these are being offered in evidence by counsel for the purpose of supporting the witness' testimony that he furnished or turned funds over to his father?

Mr. Hagerty: That is right. When the family broke up over his impending marriage, he gave the store back and the money, too.

The Court: When did you marry?

A. I married in 1924.

Mr. Drewes: Are these payments to his [326] father——

A. I gave those back, the whole payment, during the final period when I got married—when I left the store, I should say.

The Court: Have you examined these checks?

Mr. Hagerty: I showed them to him, your Honor.

Mr. Drewes: I have not seen them myself, your Honor. I turned them over to our accountants for examination.

The Court: Let's take an item of December 7, 1920, \$5038, signed Mr. Milton Olender to the order of J. S. Olender. A. J. and S. Olender.

(Testimony of Milton H. Olender.)

The Court: What is your statement concerning that check, Mr. Olender?

A. I wouldn't remember the exact details but it probably was some sum that would bring my bank balance down to an even amount. It's a payment that I gave to them.

The Court: To the partnership?

A. Yes. They may have needed that much money to pay the bills in their own business.

The Court: In other words, these were inter-partnership transactions?

A. I was not a partner with them.

The Court: That was not a gift of money to them? A. Oh, no.

The Court: You were handling the accounts and when they [327] asked for money, you gave them money?

A. I gave them money, yes, sir. In fact, I was doing a better business than they were with my modern methods.

The Court: This money belonged to them, did it not? A. No, sir.

The Court: \$5038.

A. No, sir, it was my money.

The Court: You have the books of account going back to that period of time?

A. No, I haven't.

The Court: Do you have any check registers as of that time? A. No, I haven't.

The Court: Do you have the partnership accounts as of that period of time? A. No, sir.

(Testimony of Milton H. Olender.)

The Court: I will reserve my ruling on this. I will allow the Government and their accountants to look over these items. It is rather difficult for me to orient myself to that period of time.

You say you made advances to the copartnership, did you?

A. I gave them money whenever they needed it.

The Court: That's 1920?

A. 1920 and 1921. I took the store over the early part of [328] '19—or the early part of 1920—or the latter part of 1919. I don't exactly remember. It was in that period, and from then on I gave them these checks and it was my money and I was giving it to them.

The Court: I will reserve my ruling on these checks, gentlemen.

The Court: What was the relationship—may I ask a couple of questions?

Mr. Hagerty: Surely.

The Court: What was the relationship between the copartnership consisting of your uncle and your father? That was a separate enterprise, was it?

A. Yes.

The Court: That was run independently of any enterprise that you operated?

A. That's right. They both owned the business that they gave to me, and they both gave me that store, the two of them.

The Court: They gave you that store in 1920?

A. Either the end of 1919 or the beginning of

(Testimony of Milton H. Olender.)

1920. It's within November of 1919 and February of 1920.

The Court: When did you graduate from school?

A. 1918.

Q. Where did you keep these checks during the interval of time? [329]

A. I found those checks in the vault and I had put them away myself at the time I left Fresno.

The Court: Where?

A. In the vault in the Hotel Traveler.

Mr. Hagerty: We have got a photograph of the vault. That is the purpose of the purchase that I was offering in evidence. I might add further——

The Court: Do you have the books of account now?

A. No, I haven't. I tried to find those but they were not there.

The Court: All right.

Q. (By Mr. Hagerty): Mr. Olender, these photographs that I showed you in the forenoon session in reference to the Olender building in Fresno, do you have an interest in that building?

A. Yes, I do.

Q. Did you have an interest in that building during the years 1945 and '46? A. I did.

Q. How long have you had an interest in that building?

A. Ever since the death of my father in 1940, though I actually didn't get the interest until the estate was closed, which I believe it was 1942.

Q. Were you ever made trustee of that building?

(Testimony of Milton H. Olender.)

A. I was in 1919 or '20. [330]

Q. By whom?

A. My father and my uncle, who owned the building.

Q. And as trustee of the building what were your duties?

A. I made all the leases, collected all rents, and managed the property.

Q. These photographs that I had shown you earlier in the trial, which are marked Defendant's E for identification, do they give a fair representation of the building as it existed in 1945 and 1946?

A. Yes, they do.

Mr. Hagerty: I again renew my offer to put them in evidence, your Honor.

Mr. Drewes: Objection, your Honor. I don't want to appear to be captious. I see no reason for burdening the record with matters of this kind.

The Court: Sustain the objection.

Mr. Hagerty: It is part of his net worth, your Honor, and I want to develop evidence in reference to this vault and where these checks were found, and it is part of his net worth that shows the type of building that it is. It is part of his assets.

Mr. Drewes: What do the pictures add to his testimony?

The Court: I can't see the pictures as part of his assets. [331]

Mr. Hagerty: Well, he has revenue and was receiving revenue from these properties in the course of the years in question. It is just a further ampli-

(Testimony of Milton H. Olender.)

fication of the evidence so the jury may see for its information what the building looked like, the size of it, and the various other aspects, and it will help them determine this.

The Court: I can't see that the size of the building would aid the jury. If he received \$10,000 a year income from the building, that should show in the accounts. The building may be of grand scale and yet it may not prove to be income bearing. I can't see that the picture would help you.

Mr. Hagerty: Well, the photograph itself of the store——

The Court: Nor would they be material.

Mr. Hagerty: ——a photograph of the store in the building would give an idea of the store when it was in operation.

The Court: Suppose it operated at a loss?

Mr. Hagerty: Well, in this——

The Court: Would the size have any criterion of value?

Mr. Hagerty: Maybe it might operate at a bigger loss.

The Court: I can't see it. [332]

Mr. Hagerty: I will submit to your Honor's ruling. I——

The Court: I am perfectly willing that you have in evidence anything that may help you, but I can't see that the photograph will assist you in the presentation of your case. If you have accounting data that relates to the period of time in question, that would seem to suffice.

(Testimony of Milton H. Olender.)

Mr. Hagerty: Well, I felt that the photographs indicate that it is business property and obviously from the photograph you can realize that in thirty years this type of building as property itself has materially increased in value, and the defendant inherited it as part of his net worth.

The Court: Were there probate proceedings on the death of his father? A. Yes, sir.

Mr. Hagerty: I assume so.

The Court: Was there a distribution of the estate? A. Yes, sir.

Mr. Hagerty: I wasn't attorney of record.

The Court: Was there a final distribution?

A. Yes, sir.

Mr. Hagerty: At that time I was not of counsel so I don't know.

A. There was. It is of record. [333]

The Court: When do you start with the accounting data, as of 1920, '21, on your breakdown? I have to have some starting point in mind. I just can't rule——

Mr. Lewis: Our starting date is 1944. That is, during the year 1944, your Honor. I think, as a matter of fact, that it probably would be better to go ahead with the case in questioning him about the father's funds, where they were——

The Court: All right.

Q. (By Mr. Hagerty): I show you, Mr. Olender an Army and Navy Store check. Do you recognize it? A. Yes, I do.

Q. Did you make that check? A. I did.

(Testimony of Milton H. Olender.)

Q. What is the date of it?

A. December 23, 1944.

Q. That is in connection with your operation of the Army and Navy Store, 10th and Broadway?

A. Yes, sir.

Mr. Hagerty: At this time I offer this check in evidence.

Mr. Drewes: Objection, your Honor, on the grounds it is a matter covered in the stipulation.

The Court: May I see it, please? Is this the subject of the stipulation, Mr. Drewes? [334]

Mr. Drewes: The stipulation for the three years in question includes the items under assets of the Army and Navy Store, the cash in bank 1944.

The Court: Do you have any specific purpose in this?

Mr. Hagerty: Yes, your Honor. That was an outstanding check which the stipulation itself says "Cash in bank (net after outstanding checks)." Now, this is an outstanding check that would increase the net worth \$1,000, because it was outstanding, we didn't know about it.

The Court: The clearing house endorsement is January 10, 1945.

Mr. Lewis: The check, your Honor, was December 23. The stipulation is merely the amount net after the outstanding checks as of December 31st, and so that \$1,000 was available to him and not taken in on the stipulation at all.

Mr. Drewes: The effect of that is to impeach the stipulation.

(Testimony of Milton H. Olender.)

The Court: Those are matters of accounting. The government counsel may examine the check and submit it to the accountants. If the funds be available as of that time, it might be added to his net worth.

Mr. Hagerty: That is our position.

Mr. Drewes: Our position is that it is included in the net worth. The stipulation covers it.

The Court: Is it or isn't it? I don't know. I can't [335] break this accounting matter down in 24 hours. You hand me the result of two or three years work in the brief period of two or three days. I can't analyze it.

Mr. Hagerty: Our accountants tell us that it is.

The Court: All right. Is it or isn't it?

Mr. Lewis: I am certain it is, your Honor. If it is in his pocket and the stipulation provides that after outstanding checks, and it shows it was not cashed until January 10th.

The Court: Examine it at the recess period time. You can examine it at the recess.

Mr. Drewes: We have examined it, your Honor. Our accountants point out to me that the check is made payable to M. Olender, payable to himself, so that if the matter were not included in cash, it would necessarily be included among his other assets. In other words, it was drawn on December 23, 1944, and presumably put in his wallet, so therefore it is either cash in bank or it is another asset in his possession, so the matter is a wash entry. Further, as we interpret the parenthetical phrase "net after

(Testimony of Milton H. Olender.)

outstanding checks," to mean outstanding checks had been compensated for, that the accounts had been reconciled, that that would have been added. If payable to himself—I beg your pardon.

The Court: I would assume that on a breakdown of the net [336] worth that the accounts would arrive at a reconciliation of outstanding items, it would seem to me.

Mr. Drewes: Certainly. In any event, this was in his possession, your Honor, and it is an asset whether in the bank or in his wallet, and it makes no difference. It would not be a net deduction.

Mr. Hagerty: If your Honor please, could we mark it then for identification, and when our accountant takes the stand—

The Court: Yes.

Mr. Hagerty: We will let him give his interpretation.

The Court: I think I would be in a much better condition if I heard from the accountants before I ruled on the matter.

The Clerk: Defendant's Exhibit G for identification only.

(Thereupon check in the sum of \$1,000 payable to M. Olender marked Defendant's Exhibit G for identification only.)

Q. (By Mr. Hagerty): Mr. Olender, when you started this second store after the reconciliation with your father in Fresno, how long did you operate the second store? A. You mean in 1926?

(Testimony of Milton H. Olender.)

Q. 1926, following your marriage and following the birth of your young son, your father's reconciliation with you, [337] and he called you back to start another store, and he said he would let you operate it, is that right? A. Yes.

Q. Is that a rough, quick sketch of what you said earlier before noon? A. Yes.

Q. How long did you stay in that store?

A. About three months.

Q. And you then severed relations again, did you? A. Yes, sir.

Q. Then what did you do, give us a quick sketch of your occupation from there up until your present—we will say until 1944 in Oakland?

A. Well, I can't give you an accurate sketch of it. I know that I worked in several places. I believe——

Mr. Drewes: If your Honor please, in the interests of orderly procedure, might I object here on the ground that this calls for a recital. If questions are asked of the witness, then of course, the Government would have its opportunity to make the appropriate objection. I don't know what is coming in.

The Court: All right. You may go ahead.

Mr. Hagerty: This is in the interests of time.

A. I don't remember just exactly now where I worked when I left there in 1926. [338]

Q. (By Mr. Hagerty): Well, would it be fair to say that following severed relations with your

(Testimony of Milton H. Olender.)

father that you went to work as an employee in various dry goods or clothing firms?

A. Yes, sir.

Q. In and about the Bay area? A. Yes.

Q. Is that right? A. That is right.

Q. When did you start into business for yourself again?

A. Well, I first worked for an uncle of mine in the Broadway Department Store, 2067 Broadway, and he owned a building at 8th and Broadway, and he had an empty store in that building and he had considerable merchandise in that store that was more than he needed, so he set me up in business at 8th and Broadway. The fixtures were in the store, all that I had to do was just put the merchandise on the wall fixtures and start work.

Q. About what year was that?

A. Between '27 and '28.

Q. All right. Now, how long were you in operation at that location? A. About a year.

Q. And then what happened, if anything?

A. I moved to my present location, which was then occupied [339] by the brother-in-law of the uncle who had set me up in the first business, and he moved to the location of the brother-in-law who had moved to Hayward.

Q. So you continued on in business at 10th and Broadway, is that right?

A. 1026 Broadway. It's closer to 11th street.

Q. And that was a joint enterprise between you and your uncle, is that right?

(Testimony of Milton H. Olender.)

A. No, that was my own business at that time.

Q. That was your own business?

A. I had paid my uncle or my father had paid him rather, for the 8th Street store.

Q. Did your father come up and take part in the business with you?

A. Oh, he used to come up here three or four times a year. He stayed at my home every time he came up. He came in the store and helped me.

Q. In other words, another reconciliation was effected between you and your father, is that right?

A. Oh, yes.

Q. Well, at that time did he tell you that he owed you any money or anything like that? Will you develop to his Honor what your financial transactions were with your father?

A. Well, he had—— [340]

The Court: As of what date?

Mr. Hagerty: After the start of this store at 10th and Broadway and where his father had advanced funds for him to take over the entire ownership.

A. Well, my father——

Mr. Drewes: What year was this, please?

A. Well, I don't know what year Mr. Hagerty is speaking of either.

Q. (By Mr. Hagerty): When you moved from 8th and Broadway to 10th and Broadway.

A. 1928.

Q. And took your uncle's interest in the store over, when would you fix that point of time?

A. Well, it would be 1928 when I moved to 10th

(Testimony of Milton H. Olender.)

and Broadway. I didn't take over his interest. I just moved my merchandise from 8th and Broadway to 11th and Broadway. That was my store. It wasn't his. He had no interest in it whatsoever.

Q. Now did you have any further financial transactions with your father at or about that time?

A. Not until 1930.

Q. Where did you get the money to start this store at 10th and Broadway?

A. That money came when he purchased the store through a sales contract with my uncle in 1928. I believe the purchase price was \$7,000 and he paid down somewhere between [341] five and six on it, and I paid out the balance within a year.

Q. And that store became a sole proprietorship vested in you? A. That's right.

Q. Were you a tenant in that building at that location? A. At 11th and Broadway?

Q. Yes. A. Yes, sir; I was.

Q. Did you ever change your status from tenant to owner? A. No.

Q. Did you attempt to? A. Yes, I did.

Q. Will you relate to his Honor and the ladies and gentlemen of the jury the surrounding circumstances of that event?

Mr. Drewes: Objected to as immaterial and irrelevant.

The Court: He may answer.

A. 1938, I believe, I went to the firm of Lionel Wachs and Company, who are the largest real estate

(Testimony of Milton H. Olender.)

people in Oakland, and they were representing, I believe, the Western States Life Insurance Company, who had had a mortgage on the building and had taken it over, and I made an offer to Mr. Lionel Wachs, and there is an affidavit which I believe will be presented in evidence by Mr. Lionel Wachs to that effect, that I offered him \$35,000 in cash in 1938 for the [342] building.

Q. Where were you going to get the \$35,000?

A. I had it.

Q. Where did you get it?

A. Fresno, in the vault.

Q. Was your father going to help you in this enterprise?

A. Oh, it was my money. It was my own money, I could have done whatever I wanted with it.

Q. Did the sale or the offer of purchase go through?

A. The offer was submitted and rejected, as being too low.

Q. Did you continue to see your father from that time on up until his death?

A. Right up to his death, yes, sir.

Q. Speak into the microphone.

A. I'm sorry.

Q. Did your father help you any—make any other gifts of funds to you in that period of time?

A. Just the \$5,000 each year from 1930 to 1940.

Q. Following your father's death did you go to—let me withdraw that. Where did he put these funds that he was giving you?

(Testimony of Milton H. Olender.)

A. In the vault in a safe formerly owned by me and to which he and I alone had the combination, in the Olender building. [343]

Q. And that is a vault which we have pictures of here? A. Yes, sir.

Mr. Hagerty: Again at this time, your Honor, I offer that picture of that vault in evidence.

Mr. Drewes: Objected to, your Honor, as irrelevant and immaterial.

The Court: Sustained.

Q. (By Mr. Hagerty): You spoke of a vault and a safe, Mr. Olender. This safe, who had the combination to it?

A. My father and I only, no one else.

Q. You were the only ones that had it? [344]

A. Yes.

Q. Where had that safe come from?

A. That safe was my safe in the store at 1833-5-7 Tulare Street, and when I gave up the business and left, and my father had ultimately sold out that business, he took the safe over into the vault.

Q. You still have that safe?

A. No. My mother sold it after the estate was closed.

Q. How much money did you get out of that safe following your father's death?

A. \$75,000.

Q. And that was about when?

A. Sometime——

Q. What date? A. Sometime during 1942.

Q. What did you do with that money?

A. I brought it to the Bank of America, 12th

(Testimony of Milton H. Olender.)

and Broadway, in Oakland, and put it in my safe deposit box there.

Q. At that time did you have other funds in that box? A. I believe that I did.

Q. Who had access to that box?

A. At first only me.

Q. When did you first get that box?

A. I believe I got the box in '42. In fact, this morning the gentleman, if he had given you all the records, there is [345] a record of another box which I rented in 1942, and in 1943, as is in evidence I rented a larger box.

Q. You have reference to that "gentleman" Mr. Carroll?

A. Mr. Carroll of the Bank of America, yes.

Q. Following your father's death did you assist your mother in the direction of her business affairs?

A. Yes, I did.

Q. Did you continue so to do until the time of her death? A. I did.

Q. In that period of time did she make advances of funds to you? A. She did.

Mr. Drewes: If your Honor please, I had forgotten that Mrs. Widrin was in the witness room. She may be excused to return tomorrow. Will you so advise here, Mr. Clerk? I had forgotten.

Q. (By Mr. Hagerty): After you had the safety deposit box in the Bank of America at 12th and Broadway in Oakland with you and your wife, did you subsequently open another box there?

A. Yes, I did.

(Testimony of Milton H. Olender.)

Q. And for whom was that?

A. That box was a joint box with my mother and me.

Q. How did you happen to open it? [346]

A. Well, my mother and I were partners in all of our Fresno properties and I was handling those properties. I had all of the leases, all of the insurance policies, and all of the papers connected with the property, and when my mother came up in 1944 just a short time before that I opened that box, and she came up here to stay at my home while my wife and I went to visit my son in Denver who was then at the airfield in Denver, and she brought with her at that time \$20,000 in currency, and we opened the box and put that money in that box at the time.

Q. Did you ever have communications in writing from your mother in reference to the box and its contents?

A. I did. I had no particular use for that money. I had enough of my own at the time, though my mother brought it up here for me to use, and I so wrote her that I had no further use for it and what should I do with it, and my mother wrote me a letter in which she said if I had no further use for that money—

Mr. Drewes: Objection, your Honor, calling for hearsay testimony.

The Court: Sustained.

Mr. Hagerty: As a result of certain communications from your mother did you subsequently invest that money in Government bonds?

(Testimony of Milton H. Olender.)

A. I did. [347]

Q. Had you recommended to your mother any investment, in any other kind of security?

A. I had recommended to my mother that she should buy Bank of America stock.

Q. How did you happen to make that recommendation?

A. Well, I thought it was a very good stock, and I have good reason to justify that belief. I own considerable of it now and it is worth nearly twice what I paid for it.

Q. Did you discuss the matter at any time with Mr. Reinhard, the manager of the bank?

A. I certainly did, and he recommended it to me most highly.

Q. Did you ever borrow any money from your mother during this period of time, say the early forties and through 45 and 46?

A. From 1941, I believe, until about 43 or 4—I am not sure, I borrowed a total of \$33,500 which are on my books and show that sum and I repaid her by checks from my business which are on my books and which are reflected in her bank accounts, during the years 43, 4 and 5.

Q. Now, Mr. Olender, you just testified you had more than \$75,000 in cash in your own safety deposit box. Why would you borrow money from your mother?

Mr. Drewes: Objected to as calling for the opinion and [348] conclusion of the witness.

The Court: Overruled.

(Testimony of Milton H. Olender.)

A. My mother and my father came from Russia, a country we still think very much of. They were persecuted over there and they came to America, a free country, and gave them an opportunity to become very wealthy, and in their early days they knew abject poverty, as I did as a child, and my mother said to me when I had this money, "Milton, don't touch that. I have all the money you need. I don't need any. Anything that you need I will lend you. You can repay it to me whenever you wish. Just leave that \$75,000 there as a nest egg and if the time should ever come that you do need it, you have got something you can fall back on."

Q. In the latter period of your father's life and that of your mother's life did they have income in excess of their needs, the way that they lived in life?

Mr. Drewes: Objected to as the conclusion of the witness.

The Court: Overruled.

A. They had one piece of property that netted them \$20,000 a year above all expenses.

Mr. Hagerty: Where was that piece of property located? A. Los Angeles. They also——

Q. What type of property is it? [349]

A. It is an office building and businesses on the lower floor. They also owned the Olender building in Fresno, one-half of it. I might add that the Los Angeles property which netted them \$20,000 a year was solely their property, not a partnership property, but the Fresno property, all Fresno property,

(Testimony of Milton H. Olender.)

was partnership and they had half of the income which I don't know, five or six thousand dollars a year was their share, and they owned a ranch or two, and a house or two, and they paid no rent whatsoever. My father built—when he built the Traveler's Hotel in 1916, he built a cottage or a—I don't know,—a little house up on top of the building which is still there, and which was occupied by both of them, and then subsequently by my mother until her death. They had free light, water, garbage, telephone, and everything that was with it, as part of the lease of the building to the people who leased the building from them, and about the only expenses they had was food and clothing. [350]

Q. Did your mother in the last years of her life renew her offers of loans and gifts to you of her funds? A. Yes, she did.

Q. Do you recall what year it was that you purchased the \$20,000 worth of bonds for your mother?

A. I believe it was in 1945.

Q. 1945. Was that the purchase made at the Bank of America through their staff at 12th and Broadway? A. Yes, it was. I am sure it was.

Q. At this time, Mr. Olender, I show you some books that are variously labelled, five in number. Do you recognize those books?

A. Yes, sir, those are the books of the Army and Navy Store for the years 1943 through '46, I believe.

Mr. Hagerty: At this time, your Honor, I would

(Testimony of Milton H. Olender.)

like to offer them in evidence, the books of the defendant's store.

The Court: They may be marked.

Mr. Drewes: I believe that the foundation isn't sufficient. I will object on that ground.

The Court: Well, these are the books of account; you are familiar with them?

A. Yes.

The Court: And they were maintained by whom?

A. My bookkeeper, Vera Manger.

The Court: Is she available? [351]

A. I believe she is.

The Court: These represent all of the books of account, including the cash book, the journal, and the ledger, and so forth?

A. These are the books which Mr. Root testified were in perfect order.

Mr. Drewes: Under whose supervision were they? I don't believe there is—may I ask that go out, that response, go out of the record?

The Court: The last statement may go out.

Mr. Hagerty: We will submit—we will agree that it may.

The Court: They may be marked.

The Clerk: Defendant's Exhibits H, I, J, K, and L in evidence.

(Books of accounts of Army-Navy Store, five in number, were marked respectively H, I, J, K, and L, defendant's, in evidence.)

Q. (By Mr. Hagerty): Now, Mr. Olender, di-

(Testimony of Milton H. Olender.)

recting your attention to the years, the war years, '42, '43, '44, '45, '46, you were operating your store then at 10th and Broadway in Oakland, the Army and Navy Store? A. Yes.

Q. How many employees did you ordinarily have in that store? [352] A. About three.

Q. Did you have those employees all during that period of time?

A. No, I changed one or two of them. It was very difficult at that period to get anybody in good health to be working in any store. The Government demanded that they be in war work of some type, and many of my employees received warnings, including my own stepson, and he had to leave my employ, though, he wanted to work there, and go out to the shipyards in Richmond and work.

Q. Your stepson? A. Yes.

Q. Did he go in the service?

A. He later went into the service, in the Marine Corps, and went overseas.

Q. You had another son that was in the service?

A. Yes, he was in the Army Air Corps as an aviation cadet, and after many hours of flying before he was washed out.

Q. Well, did that require you to do most of the work around the store yourself?

A. Yes, it did.

Q. Did it tend to impair your health at any time? A. It did.

Q. You were under doctor's care?

A. I was. [353]

(Testimony of Milton H. Olender.)

Q. Directing your attention now to the year of 1944, along about the month of April, did you at that time contemplate a trip to visit one of your sons at a Texas air field? A. I did.

Q. San Antonio?

A. I went to visit my youngest son at San Antonio, Texas.

Q. Did you also have a business prospect in line there? A. I did.

Q. What was that, will you tell the ladies and gentlemen of the jury?

A. There was an Army and Navy Store in Texas, the proprietor was in ill health and he wanted to get out of business, and I had learned of it through a salesman who had come into the store, and he described the type of merchandise that this man had.

Mr. Drewes: Object to this recital. Seems to be immaterial and irrelevant.

Mr. Hagerty: This is preliminary, your Honor.
The Court: Go ahead.

Q. (By Mr. Hagerty): Well, acting on certain information you received as to the availability of an Army and Navy Store in San Antonio——

A. That's right.

Q. ——did you make any business preparations for that trip there? [354] A. I did.

Mr. Drewes: Objected to as a leading question. Counsel has been leading this witness.

Mr. Hagerty: All right.

Mr. Drewes: Consistently leading.

(Testimony of Milton H. Olender.)

The Court: I suppose you are leading up to the safe deposit incident?

Mr. Hagerty: That's it.

The Court: All right.

Q. (By Mr. Hagerty): Directing your attention to your safety deposit box in which you had this large sum of currency that you testified to. Did you change the names or the tenancy on that safety deposit box before you made this trip to Texas?

A. I did.

Q. What did you do?

A. I went to see my attorney, Monroe Friedman, and told him that I was going on this trip. I mentioned the possibility of me needing some money from this vault. I asked him to go down to the vault with me to sign on the box with me and I would remove the name of my wife from that box, and during the period that I would be gone he would be the sole person that could enter that box.

Q. Did you tell him anything about your contemplated business dealings in San Antonio? [355]

A. I did. I told them that I had the prospects of buying some merchandise there, a store, and that I was taking some cash with me, but that I did not know just how much I needed; that if I needed more he was to go to the box and buy a cashier's check and send it to me.

Q. Had you taken any currency out of this box in preparation for this trip before you brought Monroe Friedman to look at and examine the contents of the box? A. I did.

(Testimony of Milton H. Olender.)

Q. How much had you taken out then?

A. Somewhere between five and ten thousand dollars. I don't remember the exact amount.

Q. And it is your testimony that you were taking that sum with you and if you needed more you would send to Monroe Friedman to get it from the box? A. That's it.

Q. Now, this was in about April of 1944; is that true? A. Yes, sir.

Q. Subsequently, directing your attention to about the year 1948, at about the time that you received a call from Mr. Root, the Bureau of Internal Revenue, and about the time you dealt with Mr. Ringo, and he prepared a working statement of your affairs, did you go to see Monroe Friedman, the present Judge? A. I did. [356]

Q. Then can you fix the date about of that visit?

A. Well, it would be some time between the time that Mr. Ringo was working on the net worth statement, which probably would have been April or May he started—it would probably be June, July or August, some time in there.

Q. I show you defendant's Exhibit D in evidence and ask you if you recognize it?

A. I do.

Q. What is it?

A. This is the affidavit of Monroe Friedman as to our dealings on the safety deposit box during April and May of 1944.

Q. Will you relate the circumstances that

(Testimony of Milton H. Olender.)

brought about the execution of this document by Monroe Friedman?

Mr. Drewes: I am going to object to that as calling for a recital.

Mr. Hagerty: I can shorten it up, but I don't want to lead him.

Mr. Drewes: I suggest that specific question be asked.

The Court: You may proceed.

Mr. Hagerty: I may lead him a little bit?

The Court: Yes.

Q. (By Mr. Hagerty): In reference to this affidavit, when you went to see Monroe Friedman did you tell him that—did you call to his mind that he had been made a party—as a tenant in common on your box, or did he remember it and recall [357] it to your mind?

Mr. Drewes: Objected to, your Honor, as calling for hearsay. The understanding from counsel is that Judge Friedman if called to testify would testify in accordance with the stipulation which is on file, and obviously any reference to what transpired at that time must necessarily be entirely a recital.

Mr. Hagerty: It is still his testimony.

The Court: I think in the light of the stipulation I will sustain the objection.

Q. (By Mr. Hagerty): Well, in all events, Mr. Olender, as a result of your conversation with Mr. Friedman, the present judge, this affidavit was executed; is that true? A. That's true. [358]

(Testimony of Milton H. Olender.)

Q. Wherein he details the counting of funds?

Mr. Drewes: Objected to, your Honor. The stipulation stands by itself; it speaks for itself.

The Court: It details the counting.

Mr. Drewes: It has been read to the jury.

The Court: The amount of money in the box is set forth?

Mr. Hagerty: Yes.

Q. Upon your return from Texas—let me withdraw that. When you got to San Antonio, did you buy the store?

A. I did not. I, as in another affidavit in this case, I missed the boat. I was too late.

Q. Had you intended to start a store and stay in San Antonio? A. Oh, no. No.

Q. What was your idea in trying to make such a purchase?

A. Well, I could have—the information I received told me that the merchandise was the type of merchandise that I used in my store and at that time it was almost impossible to obtain brass, metal ornaments, cap ornaments, every type of insignia which was a major item in my store, and when I heard that this particular business was loaded with it, I saw an opportunity to get something that others didn't have.

Q. Upon your return to Oakland following this trip to Texas, did you again change the notation on the safety deposit box? [359] A. I did.

Q. What did you do?

A. I took Mr. Friedman off the box after he,

(Testimony of Milton H. Olender.)

as he states in his affidavit, had checked it to see that it was in the same condition that it was when we had gone into it, and I put my wife back on it.

Q. Now during this period of time, that is, the war years and particularly '45 and '46, did you have any dealings with the Money-Back Smith Company?

A. I had many transactions with them.

Q. Could you indicate some of those transactions on your books for us?

A. I could if the books are shown to me.

Q. What were the transactions?

Mr. Drewes: Objected to; immaterial, irrelevant.

The Court: Overruled.

Q. (By Mr. Hagerty): What were the transactions?

A. Well, they were purchases made by me during the years 1944, 1945 and 1946. Some of them made by cash and some of them made by check, but all recorded on my books and on Money-Back Smith's books.

The Court: Do they enter into the counting at all?

Mr. Hagerty: Yes, they do.

The Court: Into your accounts?

Mr. Hagerty: Yes, they do, because the transaction was [360] shown as purchases and then in accounts payable. It was a mistake. The things were paid already for by cash by him and they shouldn't have been shown as a liability on the

(Testimony of Milton H. Olender.)

books, and we will point out those errors when the accountant takes the stand.

The Court: How do they enter into the books? Do they affect the stipulation already entered into?

Mr. Lewis: Yes, they do, your Honor. It shows one error in the stipulation, to this extent: they had already been paid in cash and they were entered in accounts payable account, and so the liabilities he had already paid Money-Back Smith for them and they did not make the entry into his investment account for the year 1944, but it just shows as an account payable, and it should have been a contribution to capital in the year 1944. Now we can delay that matter until morning, your Honor, and put the accountant on the stand and perhaps he can explain it better than Mr. Olender could.

Mr. Hagerty: It has a definite bearing on the net worth feature to the extent of those purchases.

The Court: I suggest you reserve that for the accountant and then the Government may examine the accounts so that they may be equipped to examine the accounts. Is this the first indication you have had of this matter?

Mr. Drewes: Yes, your Honor.

Mr. Lewis: As a matter of fact, your Honor, we did not [361] find it ourselves until Sunday.

The Court: All right.

Q. (By Mr. Hagerty): These purchases that you made from Money-Back Smith & Company, Mr. Olender, what were they, what was the nature of them, what kind of goods were you getting?

(Testimony of Milton H. Olender.)

A. Well, they were goods that weren't easy to get. Money-Back Smith had buyers in New York, all throughout the East, and I had nobody but myself, as Mr. Lorenzen has testified, they received merchandise which, as the name implied by Money-Back Smith, that if it wasn't satisfactory perfectly they would replace it or give him money back. I went to Money-Back Smith, and I could use merchandise of that type. They were underwear, hosiery, shirts and sweaters. The invoices would show what they were. I don't remember just what the specific items were. There were many, many of them.

Q. The lots that you would buy, were they of great quantity or small?

A. Well, there would be maybe a hundred dozen of something, which might be three dollars a dozen or five dollars a dozen. If it was hosiery, or five dollars—underwear at five dollars a dozen, which would be \$250 or so. Very few of the invoices ran over \$500.

Q. Mr. Olender, a great deal of evidence has come in here in reference to some securities that you purchased which became [362] of questionable value. Would you tell his Honor and the ladies and gentlemen of the jury how you happened to buy that stock originally?

A. The Asturias Corporation was started by two men, Rodney Asturias, Mr. Ben Neiden, who testified here this last week in regard to the stock. It

(Testimony of Milton H. Olender.)

was a doubtful proposition made from the very beginning. [363]

Mr. Drewes: Object to this, your Honor, as immaterial, irrelevant, how he came to buy this stock, whether it was doubtful or not. The question is that he bought the stock or he didn't buy the stock.

The Court: Overruled.

A. Mr. Neiden at that time—not at the present time—was married to the daughter of my uncle, a lifelong chum, who passed away when his daughter was a very little girl.

Q. (By Mr. Hagerty): At any rate, Mr. Olender, you knew the people? A. Yes.

Q. You believed in them and you bought the stock; is that right? A. That's right.

Q. And subsequently did you have any falling out with them over the stock or anything like that?

A. Oh, I had quite a quarrel before the purchase of the second, or the loan—I won't say "purchase"—it was a loan. At that time I knew that we were being taken and I told that to Mr. Neiden at the time, and he made the remark to me that "if it wasn't for your father you wouldn't have anything."

Mr. Drewes: Objected to as hearsay, your Honor.

Mr. Hagerty: We'll move to strike that.

The Court: Sustained. It may go out. [364]

Q. (By Mr. Hagerty): But the second transaction of \$5,000 with this firm was not in its inception a purchase of stock? A. It was not.

(Testimony of Milton H. Olender.)

Q. Will you just tell his Honor and the ladies and gentlemen of the jury just the conversations that occurred at the time that you made this transaction, the second transaction?

Mr. Drewes: I will object, your Honor, if it calls for conversations. Hearsay testimony is being required, apparently.

The Court: Sustained.

Q. (By Mr. Hagerty): You advanced money to the corporation; is that right?

A. That's right.

Q. Was Mr. Horne present at that time, the accountant?

A. I wouldn't be sure of it. But I believe Mr. Horne was present at all of the meetings of the Asturias Corporation. The minutes will show whether he was present or not. They state everyone who was present.

Q. I show you a letter here written by Jefferson E. Peyser, and ask you if you recognize it?

A. I do.

Mr. Hagerty: At this time, your Honor, I offer this letter in evidence. Government counsel has seen it. [365] It has reference to the shares of stock.

The Court: It may be marked.

The Clerk: Defendant's Exhibit M in evidence.

(Thereupon letter from Mr. Peyser received in evidence and marked Defendant's Exhibit M.)

(Testimony of Milton H. Olender.)

Q. (By Mr. Hagerty): On the second advance of \$5,000 to the Asturias Corporation, after paying the money how long was it before you received the shares of stock?

A. I received the shares of stock on January the 2nd, 1948.

Q. When had you made the advance of the \$5,000?

A. With the Court's permission, I should like to correct an error in the net worth statement, because it has been called to our attention by Mr. Whiteside—

Mr. Drewes: Objected to, your Honor. A question was asked and a response is expected.

Q. (By Mr. Hagerty): You will have to answer the question, Mr. Olender. We will bring that out later.

A. All right. What was the question?

Mr. Hagerty: I will withdraw the question and reframe it. When did you make the payment of the \$5,000, the second \$5,000, to the Asturias Corporation?

A. I believe it was in December of 1946. That was a loan.

Q. That was a loan? A. Yes, sir. [366]

Q. Was it subsequently converted into an investment in the securities? Of that concern?

A. I wouldn't know. I didn't get the stock until 1948.

Q. Well, was it by and with your permission

(Testimony of Milton H. Olender.)

that this loan that you made to them was converted into an investment in their capital?

A. It wasn't with my permission, no.

Q. How did they happen to? Let me withdraw that. This letter that has been offered in evidence, here, apparently written by Mr. Peyser, how did he happen to send you some shares of stock in the company?

Mr. Drewes: Objected to as calling for the opinion and conclusion of the witness.

The Court: Overruled.

A. Well, when the company looked like it was broke I believe somebody suggested that the best way to collect on the thing, if you were going to put in, it in the income tax return as a loss, is to have it in the form of shares of stock and then the Government would rule on the fact that it was valueless and could then take your loss. But I do know that the stock was, as the minutes will show, was ordered to be purchased at least a half a dozen times and before it ever went to the board the company was declared absolutely bankrupt and when they sent us the stock they were just sending us wallpaper. [367]

Q. (By Mr. Hagerty): I show you here, Mr. Olender, some various sheets marked "inventory." Do you recognize them? A. I do.

Q. What are they?

A. They are the inventories at the end of 1944, '45 and '46 of the Army and Navy Store.

Mr. Hagerty: At this time, if your Honor

(Testimony of Milton H. Olender.)

please, I would like to offer as Defendant's Exhibit next in order these inventories of the Army and Navy Store.

Mr. Drewes: It is objected to, your Honor, on the grounds as immaterial and irrelevant and also covered by the stipulation.

Mr. Hagerty: They are preliminary, your Honor, in that they will tie into one of the transactions that is in question. That is the Goodman transaction involving several suits, Navy suits that were found unmerchandisable.

The Court: I see reference made in the stipulation to the item "merchandise inventory \$85,011.26, December 31, 1944," and the tape reflects the same. For that limited purpose I will allow them, however.

Mr. Hagerty: Just to show we had an entry for that transaction I suggest they be marked for identification.

The Court: They may be marked for identification.

Mr. Drewes: Until there is further testimony and we see precisely what it is, that is, what they intend to show [368] by them.

The Court: They may be marked for identification.

The Clerk: Defendant's Exhibit N for identification only.

(Thereupon the inventory sheets marked for identification only Defendant's [368-A] Exhibit N.)

(Testimony of Milton H. Olender.)

Q. (By Mr. Hagerty): I show you an invoice, Mr. Olender, on the firm name of M. Saraga. Do you recognize it? A. I do.

Mr. Hagerty: At this time, your Honor, I would like to offer this invoice into evidence as the defendant's exhibit next in order.

Mr. Drewes: May I suggest the foundation be more completely laid?

The Court: What is this item?

Mr. Hagerty: That is in reference to merchandise purchased by the defendant from the witness Saraga, your Honor, to the transactions that were purported reflected in the Government's Exhibits 40, 40A and B, and there were various checks received from Mr. Saraga that are in evidence. It refers to the transaction that went on between the defendant and that witness and has a direct bearing upon the business practices and the net worth.

Mr. Drewes: We object on the grounds of immateriality. I ask for a more complete foundation. Where did the record come from, whose record is it? Counsel simply asked him if he recognized it. He asked the witness. The witness said that he had.

Q. (By Mr. Hagerty): Is that your bill?

A. That is a bill sent to me by Mr. Saraga for the purchase of 1,000 sailor suits. [369]

Q. This was taken from your records?

A. From my invoice records, yes, sir.

The Court: From your records?

A. Yes, sir.

The Court: I will allow it.

(Testimony of Milton H. Olender.)

The Clerk: Defendant's Exhibit O in evidence.

(Thereupon invoice, Saraga, received in evidence and marked Defendant's Exhibit O.)

Q. (By Mr. Hagerty): Now, Mr. Olender, at or about the first of the year 1944, January, 1944, did you enter into any transaction with a Mr. Goodman, George Goodman, in New York?

A. Not directly with Mr. Goodman, no.

Q. Through the offices of Mr. Levy?

A. Yes, through Mr. Levy.

Q. As a result of those negotiations, did you withdraw certain funds from your safety deposit box in the Bank of America?

A. I withdrew \$20,550.

Q. What did you do with those funds?

A. I bought about four or five cashier's checks, made out under Mr. Levy's direction to Mr. George Goodman, whom I had never met and didn't know.

Q. Did you purchase some merchandise, Navy uniforms, from——

A. Mr. Levy secured those suits for me through Mr. Goodman, and where Mr. Goodman got them, I don't know.

Q. I show you Government's Exhibit 25, "Olender, Cash on Hand [370] and in Banks" and there is an entry here—"The following sums were expended from cash January 10, 1944, three cashier's checks to Goodman amounting to \$2250 each; January 22, 1944, three cashier's checks to Goodman at

(Testimony of Milton H. Olender.)

\$2250 each; January 22, 1944, three cashier's checks at \$2350 each to Goodman."

Does that refer to this transaction you had with Mr. Goodman? A. I believe it does.

Q. Now, the uniforms you received from him ultimately were they or any part of them ever reflected in Defendant's Exhibit M, your inventory sheets, for the periods of '45-'46?

A. As of January the 1st, or December 31st, 1944, or January 1st, 1945, they were not reflected.

Q. Were they—

A. As of January the 1st, 1946, some \$8,000.00 of them were reflected, and in 1947 that had gone down to about \$2,000.00.

Q. You were present and in court at the time that the witness Whiteside was on the stand and made the statement that there was no entry in your books on the Goodman transaction. Will you show his Honor the entries in these entries relating to the Goodman transaction?

A. I don't remember what page whose were on. Didn't you have a notation or something about that?

Q. I don't know—

Mr. Lewis: Page 45. [371]

The Court: Will you look it over at the recess? and you find it. Is this the only instance where the Goodman transaction appears?

Mr. Hagerty: I believe it is.

A. Just a moment. I think I can find it.

The Court: Will you look it over at the recess?

A. I think I can find it. Just a moment.

The Court: We will take the adjournment till tomorrow morning, 10:00 o'clock, and the same admonition to you, not to discuss the case under any circumstances or conditions and not to form an opinion until the matter is submitted.

(Thereupon an adjournment was had until Tuesday, September 23, 1952, at 10:00 o'clock a.m.) [372]

September 23, 1952—10:00 A.M.

The Clerk: United States vs. Olender, on trial.

(The following proceedings were had outside the presence of the jury:)

Mr. Drewes: If your Honor please, subsequent reflection and research has convinced the Government that its questions propounded to the character witnesses heretofore by the Government were entirely proper.

(Authorities submitted and further argument in support thereof.)

Mr. Hagerty: This is our position, your Honor, maybe it is already moot, we don't intend to call any further character witnesses, unless the Government intends to call back the witnesses we have had.

Mr. Drewes: Your Honor, the matter then becomes moot, if no further character witnesses are going to be called. I have no intention of bringing the witness back.

(Further discussion.)

Mr. Drewes: With Mr. Hagerty's assurance that no further character witness will be called, the question becomes moot. I have no intention of recalling witnesses who have already testified.

Mr. Hagerty: We had one character witness that we had under subpoena but apparently he isn't going to appear and we [373] will not push the subject too far. We have accomplished our ends already, I think.

The Court: Call the jury in.

Mr. Drewes: If your Honor please, one further matter that I wish to take up at this time, before the jury is called in.

The Court: While we are here, while we have a few moments, on those checks relating to 1920-21, have you examined those checks?

Mr. Drewes: Yes, I have examined them. I am of the opinion they support nothing whatsoever. They are irrelevant, immaterial, remote.

As your Honor knows, there is in the record a stipulation entered into by opposing counsel in this matter. The first section deals with the assets and net worth of the Army and Navy Store. That stipulation was entered into Friday last before the trial, after much opportunity, plenty of opportunity for all necessary investigation and studies to be made. I might also state that the inventory figures came from the taxpayer's returns filed with the Bureau of Internal Revenue, and the other figures, for the most part, came from the working papers of the taxpayer's only accountant.

Now I have examined the record of yesterday's

proceedings, your Honor, and it appears therein that at least three separate attacks have been made upon the stipulation. One [374] was the check in the amount of \$1,000.

The Court: That has been explained now. I think the stipulation covers checks that were not cleared. I think that check is entirely irrelevant in the light of the stipulation.

Mr. Lewis: Your Honor——

Mr. Drewes: May I finish first? There are two or three other matters.

The Court: All right.

Mr. Drewes: The second apparent attack is to be found in the testimony of the representative of Money Back Smith who testified during 1944 he had made certain cash sales to the defendant Olender. Now at the time that I objected I understood counsel for the defense to state that it appeared in further examination, from further examination that those papers had somehow been improperly handled in the books of the defendant, having been entered, instead of cash purchases, as accounts payable, which would tend to inflate liability and thus understate net worth as of 1944.

The third such attempt appeared to me to be the testimony which they sought to elicit from the inventory records themselves of the defendant in the closing moments of the trial. The purpose of that attempt appears to be to increase the amount of the inventory on hand.

The Court: Under the Goodman [375] transaction?

Mr. Drewes: Under the Goodman transaction. Now I submit, your Honor, that those all appear to be attempts to impeach the stipulation, and at the very least they will tend to create questions in the minds of the jurors as to the validity of this stipulation which was entered into, as I say, fully and freely and after plenty of opportunity to make any investigations that were necessary.

I want to take this opportunity to call that to the attention of the Court, to emphasize that we consider the matter of great importance, and also at this time to move that the testimony of the witness, the representative of Money Back Smith, whose name escapes me, with particular reference to his transactions of 1944 with the defendant, be stricken from the record. The record shows that you reserved your ruling on that matter. The witness was Mr. Lorenzen.

Mr. Lewis: Your Honor, taking up the first statement of Mr. Drewes, about the cash in bank net after outstanding checks. Now that means, and I will bring a public accountant here who has worked for the Bureau of Internal Revenue for a period of five years, who will testify that this reconciliation "Net after outstanding checks" was that they deducted from the amount in the bank at the end of the year all the outstanding checks. Now Mr. Olender happened to have this one check which was deducted from the amount in the bank at the [376] end of the year in his own pocket and cashed it in January of the following year.

So it was in the same position as cash in his pocket at the end of 1944.

The Court: The clearing house stamp shows January 10.

Mr. Lewis: January the 10th.

The Court: That is correct.

Mr. Lewis: That is correct. But it was deducted from the——

The Court: Will you sit down, please?

Mr. Lewis: It was deducted from the outstanding checks or from the bank account as if it was to someone else and not to Mr. Olender.

The Court: I see your point.

Mr. Lewis: Now on your second item, which I believe was the Smith purchases. We propose to prove there were a few thousand dollars worth of Smith purchases for cash previous to May the 5th, 1944, that were paid for by the defendant by cash and yet the books showed that that was still an account receivable. Now that, your Honor, I admit—or account payable.

The Court: Account payable. In other words, that the company owed Smith.

Mr. Lewis: That Olender owed Smith. Now that——

The Court: When in truth and in fact he paid cash. [377]

Mr. Lewis: He had paid cash for that.

The Court: That would increase the net worth.

Mr. Lewis: That would increase the net worth.

The Court: As of 1944.

Mr. Lewis: That is correct.

The Court: All right.

Mr. Lewis: Now, on your next item, the purpose of proving the inventory in the Saraga and Goodman transactions, we are not trying to change one dollar of the merchandise inventory but we are going to prove that out of the \$20,500 worth of checks that had been testified were given to Goodman—Leavy-Goodman—those cashier checks in January, 1944—we are going to prove that he had that inventory—there has also been testimony about the sales to Lerman, there has been testimony about the other sales that Leavy made, and those were wholesales, and we are going to prove that when that was all washed out that the defendant had a certain number of those suits left and he put them in the inventory and marked them into inventory as from this transaction and that they are included in the amount in the stipulation. We are not trying to change the stipulation one iota as to the amount of the inventory.

The Court: Your point is that you are trying to explain the stipulation in the light of the inventory items.

Mr. Lewis: That's right. In other words, the Government [378] has implied that this—

The Court: The Government has charged that those transactions—we will call them the Goodman transactions—did not find their way into the books in any manner at all.

Mr. Lewis: That's right.

The Court: Your position is that they did find their way in part, at least, into the inventory.

Mr. Lewis: The extent of the testimony will be that there was \$8,500 worth of those suits—the exact number of suits—that went into inventory, and at the end of the year I think it was seventy-seven hundred and some odd dollars was still on hand but that they were on hand in 1944 also, but they were not included in the inventory of the store. He kept them out of the inventory of the store because he was trying to return them or sell them at wholesale because they were not the right kind of uniforms for his type of operation.

Mr. Drewes: So the last offer in connection with inventory is not——

Mr. Lewis: Does not change the net worth.

Mr. Drewes: Does not change the net worth.

Mr. Lewis: That's right.

Mr. Hagerty: No.

Mr. Lewis: No, the Goodman transaction—it is to trace the \$20,500 clear through. See.

Mr. Drewes: Very well. [379]

The Court: I think I understand your position, counsel.

Mr. Drewes: I will renew my motion to strike the testimony of the representative of Money Back Smith, Mr. Lorenzen, on the grounds——

The Court: I will deny the motion. With respect to the stipulation, the position of the Court will be that—I think it is consistent with the trend of the testimony—that explanatory notes may be made concerning the matter as illustrative, if any of the merchandise did get into the inventory. It is a note of explanation, at least, on the part of

the defendant. I think that is permissible and should be engaged in.

Mr. Lewis: That is all we intend to prove, your Honor.

The Court: The other phases of the Goodman transactions are still in the state of flux. I mean they are still fluid in my mind, at least. I haven't been able to follow them out.

Mr. Lewis: The only testimony that we have in the record on the Goodman transaction thus far is that those checks totalling \$20,500, the purchase in cash in January, 1944, were given to Mr. Goodman for the purpose of purchasing suits, and that he did eventually—the suits come out—it is all tied in with the Saraga testimony, that they had given here, and tracing those points, and, of course, it will be our contention that those funds are still on hand at [380] the end of 1944, although they are outside of the stipulation, outside of the inventory, and were never taken into inventory and never included in inventory and never made until he had disposed of all that he could at the wholesale price, like through Mr. Lerman and the suits that Mr. Leavy testified that he sold.

The Court: I think I understand your position on that.

Now with regard to the checks relating to the period of time of 1920-21, I have given rather serious thought over the night to those checks and to the field that you intend to go into, and I think clearly the Government is correct in its contention that the subject matter thereof is remote and

irrelevant to the controversy at bar. Accordingly I will sustain the objection entered with respect to those checks.

Mr. Drewes: Your Honor, I understand your Honor has clearly in mind with respect to the Money Back Smith evidence, that the purpose there is to show that the liabilities figure in the stipulation is overstated because there are accounts payable there which should not be?

The Court: That is my understanding.

Mr. Drewes: You are going to admit that testimony?

The Court: Yes.

Mr. Drewes: To impeach the stipulation.

The Court: It isn't impeaching the stipulation. Let us [381] assume that the Government and the defendant, as they did in the case at bar, entered into a stipulation with all of the formalities attendant upon such enterprise and they find, either the Government or the defendant, that there is an inaccuracy, an arithmetical inaccuracy, an inaccuracy of bookkeeping consequence, that in truth and in fact the accounts payable should have been \$10,000 more or less as it may appear through an error that may be explained in the light of testimony offered under oath. I think the Court would be in error in not permitting counsel on either side to reopen the matter to the extent of explaining the stipulation.

Mr. Drewes: I would certainly agree with your Honor as far as arithmetical error is concerned, but when after——

The Court: I assume at some stage, and I can only project my thinking to the end that I assume at some stage an accountant will get on the stand, representing the defendant, and state that upon his analysis an examination of the books of account he finds that the item of, let us say, \$10,000 should not be registered in the accounts payable as of a given date, for as it appears that the defendant allegedly or assertedly paid in cash. Now it is a question, it is to be a question of credibility in the final instance whether or not the defendant did pay in cash. If he did pay in cash, there must be some receipts therefor. [382] If he did pay in cash, the person to whom he paid the money will certainly remember the situation. If it is a question of fabrication, the Government is entitled to go into it.

Call the Jury in.

Mr. Lewis: Your Honor, before the Jury comes in, I would like to show you Schedule 2. I have already given a copy to the Government. If there is objection later, it will be all right, but I thought you should have it. (Handing document to court.)

The Court: The jurors are present, gentlemen. You may proceed with further trial.

Mr. Hagerty: Will you take the stand, Mr. Olender?

The Court: Mr. Lewis has handed me certain schedules as to the analysis of the Saraga transactions and also an analysis of the Goodman transaction. You have copies?

Mr. Drewes: Yes. We just received them.

The Court: You may proceed.

Mr. Hagerty: We also made copies for the jury, too.

MILTON H. OLENDER

the defendant herein, resumed the stand, and having been previously duly sworn, testified further as follows:

The Clerk: Mr. Olender, please restate your name for the record? [383]

A. Milton Howard Olender.

Direct Examination
(Resumed)

By Mr. Hagerty:

Q. Mr. Olender, yesterday in your testimony you told us about some checks totalling \$20,550 that through the agency of Mr. Leavy you had sent on to a Mr. Goodman in New York for certain sailor's uniforms. Can you give us the details of that transaction?

Mr. Drewes: Objected to, calling for a recital. Ask that the witness be questioned in the usual fashion.

Q. (By Mr. Hagerty): Mr. Olender, did you receive the uniforms as a result of those checks that you gave to Mr. Goodman? A. I did.

Q. Did the uniforms correspond with your specifications? A. They did not.

Q. What was wrong with them?

A. I ordered sizes 34's, 35's, 36's and 37's, which is the average size of 90 per cent of the sailors

(Testimony of Milton H. Olender.)

who are in the service—were at that time. I received no 34's, 35's, 36's or 37's. I received suits marked with those numbers on them but the 34's were 38's, the 35's were 39's, the 36's were 40's, and the sizes went up as high as 44's. And it is almost impossible to sell sailor's suits of that size unless you have a tailor right in your establishment who can cut them down, and I didn't run that kind of a store that wanted to misfit a [384] sailor.

Q. Well, what did you do with this quantity of uniforms?

A. Well, I immediately complained to Mr. Leavy about them. He said he would see what he could do about them. I just put them down in my basement and watched to see what would happen.

Q. Did you take them into your books, in your inventory books? A. I did not, in 1944.

Q. What disposition did you make of those uniforms?

A. Well, in about June of 1945 Mr. Leavy told me that he knew where he could dispose of 200 of those suits and if I would send them over to him he would dispose of them. I had no idea of whom he was selling them to and he returned the cash for those 200 suits, some \$5,000, to me, which I deposited in my store account.

Q. What happened to the remainder of the suits, do you recall?

A. Some time in the fall of 1945, July or August, Mr. Leavy had disposed of about 280

(Testimony of Milton H. Olender.)

suits, totalling around \$7,000, and he took that money with him to New York on a trip and gave that to Mr. Saraga as a deposit on suits for me, which Saraga did not deliver.

Q. Were those funds that were sent on to Mr. Saraga ever returned to you?

A. They were returned to me some time. They bounced—I [385] think there were four or five transactions in there. Mr. Saraga sent me a check postdated which, to the best of my recollection, I put through for collection, and when I got the check I believe I returned it to Mr. Leavy because Mr. Saraga told me that he could then sell me some suits, and it came back again—I think it came back three or four times. He never did deliver those suits to me and those funds were deposited in my personal account.

Q. I show you the Government's Exhibits Nos. 41 and 42. Are those checks which were returned to you by Mr. Saraga? A. They are.

Q. Did one of these checks bounce?

A. I believe it did. I don't know if it is one of those, but one of his checks bounced.

The Court: What do you mean by "bounced"?

A. I put it through the bank and it was returned "not sufficient funds."

Q. (By Mr. Hagerty): Was that a postdated check, do you recall?

A. I wouldn't be sure whether it was a postdated check that bounced or one of the ones that came to me later.

(Testimony of Milton H. Olender.)

Q. But after the check was returned to you, what did you do with it?

A. I put it finally into my personal account. Not all of it. I believe about \$7,000 of it. \$725, which was a refund on another deal that I had with Mr. Saraga, and which you have [386] the invoice there, went into my store account. It was on the books.

Mr. Hagerty: At this time, your Honor, I wonder if I might show these to the Jury, these checks.

The Court: Yes.

(Exhibits 41 and 42 passed to the jury.)

Mr. Hagerty: Mr. Olender, did you dispose of all of these suits or did you still have some on hand, the Goodman transaction?

A. I still had some 300 odd suits on hand at the end of 1945. I had sold perhaps 20 of them during the year in the store, and the balance, around \$7,900, that was carried on my inventory as of the end of 1945.

Mr. Hagerty: If your Honor please, since the defendant has testified, this much of the transaction, would it be all right if I showed these charts to the jury so they could follow the transactions as we are going through? It is rather difficult to hold these things and figures in mind.

The Court: Yes, I think so.

(Documents handed to the jurors.)

(Testimony of Milton H. Olender.)

Q. (By Mr. Hagerty): Now, Mr. Olender, to recapitulate, for the benefit of the jury, you sent—looking at the large chart—you sent \$20,550 to Mr. Goodman in payment for certain uniforms, is that true? A. It is. [387]

Q. And you found those uniforms unmerchandiseable from your standpoint?

A. That is correct.

Q. And then you attempted to dispose of those uniforms on a wholesale basis, is that true?

A. That is true.

Q. And Mr. Leavy assisted you in that respect?

A. He did.

Q. You testified that he sold about \$5,000 worth of them? A. Yes, sir.

The Court: As you proceed, would it not be advisable, in the light of the jury having the chart before them, to explain as you go along what the left-hand side represents, what the right-hand side represents, and then take each step and go through it? These people are not accountants. They have not had the benefit of months of investigation.

Mr. Hagerty: The Goodman transaction we find starting in this left-hand column. The checks, the evidence of which was put in by the Government, in their Exhibit No. 24, I believe—

Mr. Drewes: That suggests to me, before counsel begins, would your Honor instruct the Jury that the chart is not evidence unless connected up?

The Court: Well, the chart is for purposes of illustration for the simple and obvious purpose of

(Testimony of Milton H. Olender.)

permitting you to [388] follow the evidence as it unfolds. Now this represents the theory of the defendant as to what the money represented and the proceedings and how it finally evolved.

Mr. Hagerty: That \$20,550, Mr. Olender, where did you get that money?

A. Out of my safe deposit box.

Q. And about what time?

A. The early part of January, some time in January, 1944.

Q. And with the cash funds what did you do?

A. I purchased cashier's checks made out to Mr. George Goodman at the suggestion of Mr. Leavy.

Q. And you turned those checks over physically to Mr. Leavy, is that true? A. I did.

Q. Subsequently did you receive the uniforms from Mr. Goodman?

A. I did, \$20,550 worth.

Q. And at that time, to repeat again, you found that you could not dispose of them, they were not for your type of operation, so you attempted to dispose of them on a wholesale basis?

A. That is correct.

Q. Did Mr. Leavy assist you in that operation?

A. He did.

Q. And what did he do? [389]

A. He sold 200 suits, to whom, at the time I didn't know, at my cost \$25 a suit.

Q. That would amount to \$5,000; is that true?

A. That is correct.

(Testimony of Milton H. Olender.)

Mr. Hagerty: That is indicated on the first line here from the right.

Q. Now you did not know to whom those suits were sold? A. I had no idea.

Q. Did you subsequently learn?

A. Only after this Government investigation started.

Q. And who was the man who purchased them?

A. Mr. Lerman.

Q. Who is Mr. Lerman?

A. Mr. Lerman was a competitor of mine just across the street from me in the same line of business.

Q. I see. Now how could he as a competitor of yours dispose of suits that you could not dispose of?

Mr. Drewes: Objected to as calling for the opinion and conclusion.

The Court: Overruled.

A. Well, Mr. Lerman also had a tailor shop in the back of his store and when a sailor came in to buy a suit, the tailor came up there, put the chalk marks on the suit, marked it up, went in the back of the shop and finished it up. I had no tailor in my establishment. [390]

Q. (By Mr. Hagerty): All right. Now the \$5,000 you received from Mr. Leavy in return for the sale to Mr. Lerman, what did you do with that cash item?

A. I deposited that in the bank account of the Army & Navy Store.

(Testimony of Milton H. Olender.)

Q. Did Mr. Leavy dispose of any other suits for you?

A. He disposed of some \$7,000 worth.

The Court: One moment. In order to follow that transaction through, you deposited in the store bank account the \$5,000 under date of June 19, 1945?

A. That is correct.

The Court: Now how was that credited on the books? I know here you have additional investment credited to the capital on the books.

A. It would naturally be credited as the capital investment. It is money put into my business.

Q. (By Mr. Hagerty): Then following the next transaction that is shown on the chart, did you keep certain suits yourself and finally take them into your inventory? A. I did.

Q. About what would you say the cash value of those suits were that you took into your inventory? A. \$7,900 plus.

The Court: Were those 342 suits unsold?

Mr. Hagerty: Yes. That is what I had. [391]

A. Yes.

Mr. Hagerty: Yes.

The Court: Why not adopt the exact figures you have here? You say, "\$7,900." The chart states \$8,550.

A. Well, there were other suits besides those on my inventory. I had purchased other suits besides them and they were also on the inventory but they are shown separately from these suits. These particular Goodman suits are shown as

(Testimony of Milton H. Olender.)

\$7,900. There are two other items of sailor's suits.

Mr. Drewes: I object to this and ask that it be stricken, your Honor. The record speaks for itself.

The Court: It may be stricken. I am being guided now as we go along by the chart in front of me. I can't follow any other phase of it.

Mr. Hagerty: Maybe I should show the witness the chart, too, so he could have it. It's pretty difficult to keep all the figures in mind. Probably the best way, your Honor, might be just to ask the witness to explain the chart. As he goes through he can outline the transaction.

The Court: You take them up with the witness step by step so I can follow them. I assume if I can follow them, the Jury can follow them.

Mr. Hagerty: All right.

Q. Mr. Olender, you just described the Leavy transaction to Mr. Lerman, wherein \$5,000 worth of suits were sold, which [392] cash item you put back into your capital investment into your Army & Navy Store. Now, let's move to the next transaction on the chart. Right below it on the left-hand side is a figure of \$8,550 and the statement of 342 suits unsold by Leavy.

Mr. Drewes: Your Honor——

Mr. Hagerty: What did he do?

Mr. Drewes: May I object here as there is no evidence in the record that any number of suits remains unsold.

(Testimony of Milton H. Olender.)

Mr. Hagerty: I think I have asked him several times.

Mr. Drewes: It was just stricken.

Mr. Hagerty: I asked him in the earlier examination.

Q. Mr. Olender, were all these suits sold that you purchased under the Goodman contract?

A. They were not.

Q. Did you take some of them into your store?

A. I did.

Q. All right. Directing your attention to the chart, the left-hand column, the third figure down of \$8,550. Will you describe that transaction, what it represents, to the Court and to the ladies and gentlemen of the jury?

A. Well, that represented 342 suits——

Mr. Drewes: Object to that, your Honor, and ask that it be stricken, because the records will speak for themselves.

Mr. Hagerty: I think, your Honor, that he can explain [393] the transaction.

The Court: Yes, he may.

Mr. Drewes: If your Honor please, I consider this of considerable importance. The inventory records are maked for identification and they are not in evidence. That being so, this witness cannot properly testify as to how many suits were on hand at a given time.

The Court: You refer to the inventory for the purposes of refreshing his recollection. He can't carry those figures in mind.

(Testimony of Milton H. Olender.)

Mr. Drewes: I suggest that he do so, then.

The Court: All right.

Q. (By Mr. Hagerty): Mr. Olender, I show you defendant's Exhibit N, for identification, which is three bundles of inventory sheets. Can you point out on these inventory sheets the item that corresponds to the number 342 suits on this chart that were taken into your inventory? Page No. 45 of the inventory of 1945, isn't it?

A. No, that is 1/1/1945. We are looking for the end of 1945. There is an item on the inventory of 322 serge suits.

Mr. Drewes: May I see it, please? Just show me the item, please.

Mr. Hagerty: Showing you the item now in defendant's Exhibit N for identification, which is a group of inventory sheets for the year 1946, January 1st of 1946, an inventory [394] sheet marked "Miscellaneous items, basement No. 1," and on the middle of the page there is a quantity indicated of "322 serge sailor suits."

Mr. Drewes: Will your Honor examine the item to which the witness has referred (handing to Court). I submit, your Honor, there is nothing appearing therein to identify those suits as to source, amount or in any other particularity as an inventory record which shows as of the date in question he had those suits in stock and that apparently is the source of the testimony being elicited. I assume the witness had sailor suits on hand at the beginning of the year since he has

(Testimony of Milton H. Olender.)

been in business, as far as the records are concerned.

Mr. Hagerty: That is true, but the amounts will show the difference in the number of items.

Mr. Drewes: The record speaks for itself. If counsel will just point out to your Honor how that record supports the testimony which is sought to be put in the record——

The Court: Counsel, this is the basis or bases for the explanation on the theory of the defendant. They select an item in the inventory of "322 serge sailor suits" as a predicate for the amount shown here on the right-hand side of this breakdown of the sheet. They state that 20 suits were sold through the store register and 322 suits included in the inventory. If that is their position——

Mr. Drewes: Those are being identified as specific suits [395] that were purchased from the specific source and sold to a specific man.

Mr. Hagerty: Sure, it is a specific——

Mr. Drewes: ——traced from the vault into the bank account, and it is based on that particular record which your Honor has before you, and it supports nothing except that he had 322 suits.

Mr. Hagerty: It is a specific——

The Court: That may well be, but, counsel, you have the opportunity of examining on cross-examination as to this item of 322. You have the right to go into all phases of this analysis. They adopt the item of 322 suits.

Mr. Drewes: I objected to it on the grounds

(Testimony of Milton H. Olender.)

that the record was the best evidence. It is not in evidence and it does not support the testimony, and I objected.

Mr. Hagerty: We have offered it in evidence and you objected to it.

Mr. Drewes: On the grounds that it doesn't—

The Court: The objection is overruled. All of the factors, counsel, concerning the introduction of these items into the inventory may be gone into by you on cross-examination.

Mr. Drewes: I appreciate that.

The Court: In all phases of a matter.

Mr. Drewes: I appreciate that, your Honor. But it is my [396] position that the defendant is lifting himself by his own bootstraps. We have documents which have not been admitted in evidence and he is testifying from them. Now, I admit—

Mr. Hagerty: I will again offer—

Mr. Drewes: I object on the ground that the record speaks for itself. I object to the testimony. Now, if he offers the record in evidence—

The Court: The purpose of exhibiting the inventory to the witness was to refresh his recollection.

Is your recollection now refreshed as to the amount in question? A. It is, sir.

The Court: That was my purpose. I was not inclined to rule on the admissibility of the inventory. This witness testifies under oath that out of the original lot 322 suits were found—they were

(Testimony of Milton H. Olender.)

in the inventory. Now that is his testimony under oath. It is not for the Court to rule on the admissibility of the inventory. He testifies that 322 suits found were in the inventory. Now, there it is.

Mr. Hagerty: Now if Mr. Drewes has changed his position——

The Court: Let's not argue.

Mr. Hagerty: ——and will not object to this going in——

Mr. Drewes: I have not changed my position.

Mr. Hagerty: I will offer it into evidence. [397]

Mr. Drewes: I will object, Mr. Hagerty.

Q. (By Mr. Hagerty): Having refreshed your recollection there and found the items we have been discussing, can you tell us what happened to the 342 suits as indicated on the Schedule 1, analysis of the Goodman transaction, Mr. Olender?

A. Well, there were 342 suits left after selling 200 suits to Mr. Lerman, and 280 suits, which Mr. Leavy had disposed of, and of those 342 suits some twenty of them had been sold in my store, put into my cash register and recorded as sales of the business, and at the end of the year the 322 suits were included in my inventory.

Mr. Drewes: Your Honor, that is going a bit too fast for me. I wonder if we might have it a little bit slower. 342, 322 remaining, I didn't quite understand. Would you recapitulate?

A. We sold 200 suits——

(Testimony of Milton H. Olender.)

Mr. Drewes: How many did you have? Let's start from there.

A. 822 suits.

Mr. Drewes: When was that, Mr. Olender? I assume I may ask.

Mr. Hagerty: We have no objection.

A. When the Goodman suits came in there were 822 suits delivered.

Mr. Drewes: I just want the date, Mr. Hagerty. Would you [398] ask him that, the approximate date, when was that?

Q. (By Mr. Hagerty): In the Goodman transaction, Mr. Olender, about when did you get delivery of these suits, if you recall?

A. I believe most of them came in during February and March. They didn't all come in at once. They came in piecemeal.

Q. That is in the year 1944? A. '44.

Mr. Hagerty: Is that it?

Mr. Drewes: Yes.

Q. (By Mr. Hagerty): Now, Mr. Olender, directing your attention to about the fourth figure down in the left-hand column, Schedule 1, the \$7,000 figure. Can you explain that to the ladies and gentlemen of the jury?

A. Well, that \$7,000 was the proceeds of the sale of suits that Mr. Leavy had made for me at \$25 a suit, my cost, and which he turned over to Mr. Saraga.

Q. Now, directing your attention, Mr. Olender,

(Testimony of Milton H. Olender.)

to Schedule 2 of the analysis, the smaller sheet, the analysis of the Saraga transaction——

A. I haven't that, sir.

Mr. Drewes: If your Honor please, I have no intent to upset this examination, but a moment ago I requested that the witness go through each one and point out——. I had lost [399] track of it and we went back and we had 822 suits to begin with. Now if Mr. Hagerty has no objection, I wonder if we could go through that again.

Mr. Hagerty: Do anything you wish, to accommodate you.

Mr. Drewes: Would you, please? First, before going on, there were 200 then sold to Lerman.

Mr. Hagerty: You would like the suits outlined—that is, from the suit standpoint and not from the financial transaction?

Mr. Drewes: Yes.

Mr. Hagerty: Is that it?

Mr. Drewes: Yes.

Mr. Hagerty: All right.

Q. Mr. Olender, Mr. Leavy first disposed of 200 of those suits for you to Mr. Lerman, is that true? A. That's correct.

Q. Then he next disposed of about how many, how many do you find?

A. 280. That makes 480.

Q. 480?

A. And 480 from 822 would leave 342 suits. Simple subtraction.

Q. And the 342 suits were ultimately at the

(Testimony of Milton H. Olender.)

end of the year taken into your own inventory?

A. That's right. [400]

Q. As you testified.

A. Minus the 20 suits that had been sold.

Q. As evidenced by your inventory sheets, is that true? A. Yes.

The Court: Do you have the invoice of the sale of the 20 suits any place?

A. I have no invoices. You couldn't have an invoice. Those were sales to individuals.

Mr. Hagerty: Those were sales at retail in your store?

A. At retail, yes. They were sold at retail.

The Court: Those sales will show in your books?

A. They will show in my daily sales.

The Court: They will be reflected in books of account here? A. Yes.

The Court: All right. How do you account for the differential between \$7,889, as embraced on the inventory, and the figure \$8,550 as included in your breakdown here on this transaction? The projected figure in the inventory is \$7,889, and this figure is \$8,950.

A. Twenty suits would be how much? \$450.

Mr. Hagerty: I believe there is an error in the figure. The price as indicated in the inventory sheet of \$24.50 instead of \$25. [401]

Q. Would that account for that difference, Mr. Olender? A. It might, I don't know.

The Court: You take the suits into the inven-

(Testimony of Milton H. Olender.)

tory, according to your testimony, Mr. Olender, 322 suits at an inventory cost of \$24.50.

A. Yes, sir.

The Court: You multiply 322 times \$24.50, and you get \$7,889, is that correct? A. Yes.

The Court: You figured that out before?

A. I presume I did. I made all those——

The Court: How do you account for the difference between the \$8,550 and the \$7,899?

A. I did not get up this chart, your Honor. The accountant got it up and he has worked that out. I didn't.

Mr. Hagerty: The 342 suits, your Honor, would be at the rate of \$25, which was the cost instead of \$24.50.

The Court: The difference is 50 cents. If you multiply fifty cents times 20 suits, how much would it give you? A. Ten dollars.

Mr. Hagerty: Ten dollars.

The Court: That would not account for the difference between \$8,550 and \$7,889, would it? I wish you would have your accountant break that down for me, and also examine the [402] books of account and find out the proceeds of the 20 suits, where they show in the books of account.

We will take the morning recess now, ladies and gentlemen, with the same admonition to you, not to discuss the case under any conditions nor to form an opinion until the matter is submitted to you.

(Recess.) [403]

(Testimony of Milton H. Olender.)

Mr. Hagerty: I believe just before we recessed, your Honor brought up something about the difference in the inventory item of \$7,889 as against the other item of \$8,550 shown on the chart. That error is accounted for by a mistake in pricing on the inventory sheets that reduced the price of 50c and there is also 20 suits out of the item. If we price 322 suits at \$25, we find that that amounts to \$8,050, and then 20 suits at \$25 make \$500. That would make \$8,550. There is an error in the price.

There was a pencil notation on the inventory sheets showing that those suits had been \$24.50 instead of \$25, that accounts for the difference. But following this witness we will have the accountant who has analyzed the books and prepared these charts and he will be able to explain that for you.

Mr. Drewes: What statement did you make with respect to the 20 suits?

Mr. Hagerty: Twenty suits that were sold were priced into the inventory at \$25. That would be \$500.

Mr. Drewes: You mean they were not sold?

Mr. Hagerty: They were sold, so there were only 322 left in inventory. As you saw in the inventory sheets, 322 left out of 342 that first went into the inventory sheets.

Mr. Drewes: I believe before the recess, your Honor, you requested that he had better point out in his books the [404] accounting for the 20 suits sold here.

(Testimony of Milton H. Olender.)

The Court: I assume they will at the proper time.

Mr. Hagerty: Ultimately they will show in the general sales from the store.

The Court: And that they are reflected in the books of account which are before the Court.

Mr. Hagerty: Yes, I have the accountant's word for that, your Honor. I am not an accountant myself.

The Court: That takes us to the next item, does it?

Mr. Hagerty: Yes, your Honor. The next item would be the item of \$7000 cash in the left hand column, as I understand it.

Q. (By Mr. Hagerty): Mr. Olender, directing your attention to the item of \$7,000 in the left hand column of Schedule 1 what does that figure represent?

A. Which one? There are three \$7,000 items.

Q. That is right. Start with the first one and go on to the next, and explain it to us.

A. Well, the first \$7,000 represents the suits which Mr. Leavy sold, and the second \$7,000 represents the proceeds of that sale which he turned over to Mr. Saraga. The third \$7,000 represents part of the refund check which I received from Mr. Saraga of \$7,725.

Q. And why was money refunded to you?

A. Partly because he could not send me any more suits. He [405] couldn't deliver those suits, and partly because of the failure to deliver in the

(Testimony of Milton H. Olender.)

other purchase which I had made to him of some of the suits and I had a refund on that.

Q. Now, that item of \$7,725 with the notation to the left of the total of the Saraga check dated November 15th, 1945, does that have reference to Government's Exhibit No. 41, the check on M. Saraga?

A. I presume that it does; same date.

Q. Would you look at the endorsement on the back of that check?

A. It is endorsed by the Army-Navy Store by M. Olender.

Q. When you received that check do you recall whether or not it was post-dated?

A. I am sure that it was post-dated.

Q. Subsequently did you have the difficulty in making collection for that item?

A. I am not sure if it was that item or a later item.

Q. If you will look at the endorsements on the back maybe your mind would be refreshed. Will you read those endorsements on the back of the check?

A. Well, the first endorsement is dated November 9th, the Bank of America, Oakland, main office, which is evidence that I deposited the check before the November 15th date which is on there. The second endorsement—well, there is three on here. I can't read the date on this second one. [406] There is the stamp of the Oakland Bank of America, and the third endorsement is to any banker or

(Testimony of Milton H. Olender.)

trust company or through the New York clearing house.

Q. What is the date of that?

A. November 14, 1945, the day before this check was dated.

Q. Is there a third endorsement on there, Bank of America collection department?

A. Yes, there is.

Q. Does that refresh your memory in any respect as to the check?

A. Well, I must have put that check through for collection.

Q. Would this be the check, then, that was returned unpaid and then you took to the bank for collection? A. It probably is.

Q. Can you point out to us in your books which are in evidence, Mr. Olender, the records you have of the Saraga transactions as represented by these items of \$7,725 and also the last four or five items in the right-hand column of Schedule No. 1?

A. If you bring me the book I guess I can. Which item do you want?

Q. Well, explain the whole transaction. Can you explain the entire Saraga transactions from Schedule No. 1 or from the analysis in Schedule No. 2?

A. Well, I believe No. 2 would be simpler. I mailed Mr. [407] Saraga a series of checks totalling \$18,000 on the Army-Navy Store account and subsequently mailed Mr. Saraga a check for \$6,500 on the Army-Navy Store account totalling \$24,500.

(Testimony of Milton H. Olender.)

I think you will note that is item 4. I received an invoice from Mr. Saraga dated 7-31-45 for one thousand suits at \$25.

Q. Well, just a moment now. On the right-hand column of Schedule No. 1, that is the long sheet, are those checks and the dates of those checks outlined there and those payments beginning at \$18,000 July 31st? A. They are in my books.

Q. Can you find them from your books there? Can you point them out in your books?

A. Just a minute.

Q. I think they are marked.

A. On page 53 of the cash paid out journal dated——

Q. Which is defendant's Exhibit No. K in evidence.

A. (Continuing): ——dated 7-23 there are checks No. 2500, 2501, 2502, 2503, and 2504 each one for \$3,600 totalling \$18,000.

Q. And that corresponds to a similar item of \$18,000 shown on Schedule No. 1 in the right-hand column, the fourth figure down from the top, is that true? A. That is correct.

Q. Then can you find the next figure in your books there, [408] the \$6,500 item dated August 2, 1945?

A. Yes, it is on the same page, page 53, dated 8-2, M. Saraga, \$6,500.

Mr. Hagerty: May I show this to the Jury, your Honor? I will just hold it up.

The Witness: These are the \$3,600 checks to

(Testimony of Milton H. Olender.)

Mr. Saraga. There is one, two, three, four, five of them totalling \$18,000 and here is the M. Saraga check No. 2519 for \$6,500.

Q. (By Mr. Hagerty): Now, can you show from your books the merchandise that was charged into your purchases in connection with this transaction which would correspond to the figure, the next to the bottom figure in the right-hand column of Schedule 1? I believe you would find that in the purchase register at page 40 or 41 which is item 3 on Schedule 2. It is the smaller sheet?

A. Yes, on 7-31 there is an invoice from M. Saraga entered in as a purchase of \$23,775.

Q. Will you hold the book up and point it out to the ladies and gentlemen of the jury?

(Witness complies.)

Q. Now the final item, the \$725 item at the bottom of the right-hand column on Schedule 1, and also item 6, it is the same thing on Schedule 2, \$725, can you explain that to the ladies and gentlemen of the jury and can you [409] point it out in your books? I believe it is the general journal, page 21.

A. (Witness complies.) There is a notation on page 21 accounts payable were credited, I presume, 7-25, and it is noted refund from Saraga account, suits not delivered, miscellaneous account.

Q. Now, the last item on Schedule 2 which is \$7,000, can you explain that item to the ladies and gentlemen of the jury?

(Testimony of Milton H. Olender.)

A. Well, that is the \$7,000 which Mr. Leavy originally took to New York with him and which I deposited in my personal account.

Q. Then I would ask you this question, Mr. Olender. In these transactions with Mr. Goodman and with Mr. Saraga was it ever your intention to conceal any of these items?

Mr. Drewes: Objected to, your Honor, opinion and conclusion of the witness.

Mr. Hagerty: I will rephrase it then.

Q. Did you attempt to show all these transactions in your books, Mr. Olender?

A. I did ultimately, yes.

Q. Did you ever compare your books with other stores with whom you had done business with reference to purchases?

Mr. Drewes: Objected to as immaterial and irrelevant, your Honor. [410]

The Court: Sustained.

Q. (By Mr. Hagerty): Did you know a Mrs. Foote? A. Yes, I did.

Q. Who was she?

A. She was my wife's mother.

Q. In the year 1945 did you ever receive any funds from Mrs. Foote?

A. I received \$2,500 from Mrs. Foote.

Q. And would you explain that transaction to His Honor and the ladies and gentlemen of the Jury?

A. Well, Mrs. Foote had been saving up considerable money for several years, and she was in

(Testimony of Milton H. Olender.)

her eighties, she had lived with me since practically the day I was married until 1939 and she gave me that money for a specific purpose.

Q. What did you do with the money?

A. I gave that money to my wife to deposit in her bank account.

Q. Now, yesterday you testified in reference to the affidavit of Judge Monroe Friedman. At the time that the money was counted out in your box in his presence in the Bank of America in Oakland, how much money was there in that box at that time? A. \$75,000.

Q. Did you count the whole amount and all the contents?

A. We counted everything there, yes, sir. [411]

Q. When you learned that the United States was questioning your income tax declarations, what did you do?

A. I went to my banker and personal adviser, Mr. Reinhard.

Q. About when was that?

A. Early in 1948.

Q. What did you do then?

A. Well, I told Mr. Reinhard that I was having some difficulties, that they were questioning some of my T.C.R. returns and some bond purchases which I had made over the counter with him and a business transaction which I could explain, but that I wanted to get an accountant and a tax attorney. I did not want two men. I did not want an attorney and an accountant separately, but I

(Testimony of Milton H. Olender.)

wanted a combination of the two in one man, and he said that he knew of such a man. He said the firm of D. A. Sargent & Company had a tax attorney and accountant as a partner of Mr. Sargent in the firm.

Q. Then what did you do?

A. I went to see Mr. D. A. Sargent—

Mr. Drewes: Object to any further questioning along that form, your Honor. May questions be asked in the usual manner so that I can have an opportunity to object?

Mr. Hagerty: I said "What did you do?" and the answer, naturally would be he went to this firm.

Mr. Drewes: The witness answered, Mr. Hagerty— [412]

Q. (By Mr. Hagerty): What did you do after you received advice in reference to this certain firm?

A. I went to see Mr. Sargent and as I entered the door of the firm of D. A. Sargent & Company I read on that door, "D. A. Sargent" and underneath that, "Charles R. Ringo, CPA, attorney-at-law."

Q. Who did you talk to at that firm?

A. I talked to Mr. Sargent at that time and told him just what I wanted, and the type of person that I wanted, and I never spoke to Mr. Sargent again from the very inception of this case until this day about any of the facts, figures or anything concerning this.

(Testimony of Milton H. Olender.)

Q. You used the phrase that you haven't spoken to Mr.—

A. I mean that we have nothing—he had nothing whatsoever to do with any of the accounting features personally with me. I never spoke to him.

Q. Then what next happened?

Mr. Drewes: If your Honor please, these questions all call for recitals, they are self-serving declarations without end. I wish you would instruct counsel to ask questions in the usual form so the Government can have an opportunity to object.

Mr. Hagerty: I don't know how I could ask a question that would be less leading. I could ask him did Mr. Ringo come to see you? [413]

The Court: All right.

Q. (By Mr. Hagerty): Did Mr. Ringo come to see you?

A. Mr. Ringo came to my store and we sat in the back of the store, and I explained to him just exactly what I wanted. I told him, I said, "Mr. Ringo, I understand you are an attorney as well as an accountant, and as such I have certain information that I should like to give to you," and I, at no time, had a contract with the firm of Sargent & Ringo. The fact that Mr. Reinhard had sent me there was sufficient for them to know that I was all right.

Mr. Drewes: May that all be stricken as not responsive and self-serving?

The Court: The motion may be granted.

(Testimony of Milton H. Olender.)

Q. (By Mr. Hagerty): Did you retain Mr. Ringo at that time? A. I did.

Q. Did you then carry on with him all your tax matters? A. I did.

Q. Was there any particular reason why you wanted an attorney and an accountant combined in one man?

Mr. Drewes: I will object to this, your Honor. It calls for a self-serving answer.

The Court: Overruled.

A. Yes, there was. In my net worth statement, as is noted, there are many items concerning my mother, and my [414] mother was seventy years old and not in good health, and I didn't want many of those items disclosed. I didn't think that they were part of anybody else's business but my mother's and mine.

Q. Yesterday you spoke about \$75,000 that you brought from the vault in Fresno up to Oakland and deposited in your own safety deposit box. Have you ever counted that money in your father's lifetime? A. Many times.

Q. Did any of that money come to you from your father's estate? A. None of it.

Q. Mr. Olender, I show you Government's Exhibit No. 20 for identification, a partnership return for the year of 1946. Can you identify that document? A. I can.

Q. Who are the names on that partnership return? What are the names on it?

A. Olender, Hamilton, Caplan, Gambord.

(Testimony of Milton H. Olender.)

Q. Who are those people? Can you identify them?

A. Olender represents Mrs. J. Olender, my mother, and me. Hamilton is Martha Hamilton, my cousin. Caplan is Esther Caplan, my cousin. Gambord is Terris Olender Gambord, my sister.

Q. Is that the return on which you showed an item in [415] connection with the sale of the Riverdale Ranch?

Mr. Drewes: If your Honor please, that has been marked for identification only. It is a Government exhibit. I suggest that it be put into evidence if the witness is going to be questioned with any particularity.

The Court: That is correct, counsel.

Mr. Hagerty: We don't have ours. We will bring ours this afternoon. We just don't happen to have it, but ours has an additional memorandum attached.

The Court: Well, reserve it until this afternoon.

Q. (By Mr. Hagerty): Did you receive any gift from your mother during the years 1944 or '45?

A. Yes, I did.

Q. Can you tell us about those gifts?

A. I don't remember the exact sums, but they are reported in my net worth statement, the amounts and the dates. There were two or three thousand dollars at a time two or three times a year.

Q. I show you Exhibit 7, Schedule A, on Government's Exhibit 24—

(Testimony of Milton H. Olender.)

Mr. Drewes: I call counsel's attention to the fact that that is for identification only, your Honor.

Mr. Hagerty: Oh, I am sorry, it is Exhibit 25 for identification. 24 is in evidence—Government's Exhibit 25 for identification, the last sheet thereon indicated as [416] being Schedule A. Does that, after reading that, does that refresh your memory as to gifts you received from your mother?

A. It does.

Q. Could you tell us what gifts you received and when you received them as outlined there?

A. You wish them from 1942 on?

Q. No, just during the period that is involved, 1944, '45, '46?

A. On January 6th, 1944, there was a \$2,000 gift. On July 5, 1944, \$2,500. On December 15, 1944, \$1,000. On January 2, 1945, \$3,000.

Mr. Hagerty: If your Honor please, in reference to that partnership return I was speaking of, our own copy unfortunately has been left at the office and I would like to examine the defendant in reference to that. I wonder if we could start the noon recess now.

The Court: Ladies and gentlemen, we will take the noon recess and resume at two o'clock this afternoon with the same admonition not to discuss the case under any conditions or to form an opinion until the matter is submitted to you.

(Thereupon Court was recessed until two o'clock p.m.) [417]

September 23, 1952, 2:00 P.M.

MILTON H. OLENDER

the defendant herein, resumed the stand, and having been previously duly sworn, testified further as follows:

Direct Examination
(Resumed)

By Mr. Hagerty:

Q. Mr. Olender, I show you a partnership return for the year 1946 which is marked as the United States No. 20 for identification (handing to witness.) Do you recognize that partnership return? A. I do.

Q. Did you prepare that partnership return?

A. I did.

Q. Is there any reference in that partnership return to a sale of the Riverdale Ranch?

A. There is, in the partnership breakdown, but there is missing a sheet which was filed with this return called "Schedule 1040," which reported in detail the sale of that ranch. It was stapled on here originally and is not with this return.

Q. I now show you a similar form of partnership return for the year 1946 and a schedule of gains and losses, which is Schedule D, Form 1040, Government forms, United States Government forms for income tax purposes, and ask you if you recognize those forms? [418]

A. I do. I prepared them also.

Q. Where did you get those forms?

A. These are from my files.

(Testimony of Milton H. Olender.)

Q. Are those your own copies of the returns that were made on that partnership for that year?

A. They are.

Q. What does that schedule "Capital Losses and Gains" refer to?

A. It refers to the sale of property, of the sale of the Riverdale property, which was sold in 1946.

Q. Was the original of that form submitted with your partnership return to the Federal Government?

A. It was.

Mr. Hagerty: At this time, your Honor, I would like to offer in evidence as the defendant's next in order this partnership return with its accompanying schedules.

Mr. Drewes: May I ask the witness one or two questions on voir dire?

The Court: Yes.

Mr. Drewes: And may I see the exhibits, please?

Q. I hand you the partnership return and the schedule to which you have referred, Mr. Olender, and ask you if the schedule is an original or a copy?

A. This is a copy of the original.

Q. The schedule? [419]

A. This, yes, sir.

Q. I call your attention to the fact that the Schedule D refers to Form 1040, whereas the partnership form of course is Form 1065, and ask you if you submitted the schedule in connection with your partnership return or with your individual return?

(Testimony of Milton H. Olender.)

A. I submitted that with the partnership return, and that was the form given to me by the Internal Revenue Office in Oakland to file with this partnership return.

Mr. Drewes: No further questions.

Q. (By Mr. Hagerty): I show you, Mr. Olender, a State of California partnership return of income, Form 565. This is the yellow duplicate copy, and ask you if you recognize it?

A. Yes, sir.

Q. What is that partnership return that you are looking over now?

A. It is a return for the same partnership which was filed with the State of California for the year 1946.

Q. Does that return indicate a loss?

Mr. Drewes: Objection, Mr. Hagerty, and ask that—call counsel's attention to the fact that the return has not been put in evidence. In connection, your Honor, with the exhibit which you are now examining, I would just like to reserve objection on the ground that it appears to be an original and not a duplicate—specifically with respect to [420] the schedule, I refer to that.

Mr. Hagerty: Well, if your Honor please, I believe that goes to the weight of the testimony more than anything else.

Mr. Drewes: We may find it necessary to have it examined by an analyst of questioned documents.

The Court: This is the duplicate, is it?

Mr. Hagerty: That, the form itself.

(Testimony of Milton H. Olender.)

A. May I explain that?

The Court: Yes, you may.

A. Your Honor, I typed all of these forms myself. As you know there are six names on that partnership and I only made one or two or three carbons and then I made another original and I kept the original so that I would have a good copy. But the original of the first that I typed went to the Internal Revenue Department.

The Court: But these are true and correct copies?

A. True and correct, just as they were filed.

The Court: I will accept that statement.

Mr. Hagerty: We ask they be introduced in evidence then, your Honor.

The Court: Yes, they may be marked.

The Clerk: Defendant's Exhibit P in evidence.

(Thereupon Federal Return was received in evidence and marked Defendant's Exhibit P.)

Mr. Hagerty: Then I would offer into evidence, your [421] Honor, the partnership return that the defendant has just testified to made up for the State of California.

Mr. Drewes: To that I object, incompetent, irrelevant and immaterial, your Honor.

The Court: The purpose of the return?

Mr. Hagerty: The purpose of that, your Honor, is to rebut the inference and statements by Government witnesses on the stand that the defendant failed to report the loss on the sale of the Riverdale Ranch, which Schedule in connection with

(Testimony of Milton H. Olender.)

that form is identical in general terms with that reported on the Federal form.

Mr. Drewes: Obviously it has no such probative force.

Mr. Hagerty: It would tend to show a course of conduct on the part of the defendant. He reported the incident in his Federal form and he also reported it in his State form. The general presumption would be that he——

The Court: I will allow it.

Mr. Hagerty: ——would have no reason to hide the transaction.

The Court: I will allow it. It may be marked.

The Clerk: Defendant's Exhibit Q in evidence.

(Thereupon California State Form was received in evidence and marked Defendant's Exhibit Q.)

Mr. Hagerty: You may cross-examine. [422]

Cross-Examination

By Mr. Drewes:

Q. Mr. Olender, you testified that you graduated from the University of California in the year 1918?

A. Yes, sir.

Q. And while in attendance at the University of California did you take any courses in accounting?

A. About three courses in my four years.

Q. Did you, Mr. Olender, prepare the tax re-

(Testimony of Milton H. Olender.)

turns for yourself and for your wife for the years 1945 and 1946 which have been admitted into evidence? A. I believe I did, sir.

Q. They are the Exhibits 1, 2, 3 and 4 in evidence. And you believe that you did?

A. I believe that I did, for '46 and '45.

Q. Did you prepare income tax returns for yourself and your wife in prior years?

A. Yes.

Q. Have you prepared income tax returns for other persons, Mr. Olender? A. Yes, I have.

Q. Will you state for whom you prepared tax returns?

A. All—not all. My mother, my sister, my son and daughter, employees in my store who had just wages and such, and for a few friends. [423]

Q. Did you ever receive compensation for preparing income tax returns for others?

A. Yes.

Q. And will you state when, for whom you prepared the returns and how much received?

A. Sometime in the early forties I prepared—I did not prepare—I assisted in the preparation of the returns of the Simmons Glove factory relatives of mine.

Q. And you were paid for that work?

A. They tendered me a check which I did not keep.

Q. You returned the checks to them?

A. No, I did not return the checks to them directly. I cashed those checks and gave my aunt,

(Testimony of Milton H. Glender.)

who is a very ardent social worker, the money to give to a couple of her charities. The sum was only \$25.00.

Q. For what years did you prepare those returns, do you recall?

A. Oh, it was '40, 1, 2 or 3, somewhere along in there. After that I just couldn't handle it. I had too much of my own affairs to take care of.

Q. How many returns did you prepare?

A. For whom?

Q. For the Simmons Glove factory.

A. Oh, several. Several prior to that, for which I wasn't paid. [424]

Q. Do you recall specifically how much you were paid for that?

A. \$25.00 was the most. I think there were two.

Q. On how many different occasions?

A. Two occasions.

Q. On two occasions? A. Yes.

Q. Did you report a receipt of that money?

A. I did not report the receipt and I did not report the disbursement.

Q. And you have testified, Mr. Glender, to a business concern owned by your uncle and your father which was operated by them in Fresno for a couple of years? A. Yes, sir.

Q. Did you do auditing work for that firm?

A. No.

Q. You worked for that firm, as you have testified, following your graduation?

(Testimony of Milton H. Olender.)

A. For a very short period.

Q. Did you not ever do auditing work?

A. No, sir, not to my knowledge.

Q. Did you do auditing work for a firm in which your mother had an interest?

A. A firm that my mother had an interest in?

Q. Or a business undertaking? [425]

A. Not auditing, no, sir. I never did any auditing in my life for anyone.

Q. Mr. Olender, you recall filing an affidavit with the Bureau of Internal Revenue in connection with your father's estate in which you stated you had graduated from the University of California in 1918 as a trained accountant and that beginning in that time and thereafter for a number of years you performed the audits of the businesses in which your father and uncle and mother had an interest?

A. I will answer that question, if you permit me to explain.

Q. Answer the question.

A. I signed such an affidavit.

Q. And did the affidavit contain the statements which I have just referred to?

A. It may have.

Q. I am going to show you a document in the form of an affidavit and call your attention particularly to page 3 and to the language which begins on line 4 and continues thereafter to line 10 and ask you if that refreshes your recollection?

A. Yes, sir.

Q. Did you file such an affidavit?

(Testimony of Milton H. Olender.)

A. Yes, sir.

Q. Did you state in that affidavit that you were a trained [426] accountant and that for a number of years you had audited the books of the family businesses in which your mother and father and uncle had an interest?

A. That is what it says in there.

Q. This is your affidavit? A. Yes, sir.

Q. This affidavit was sworn to by you, Mr. Olender? A. Yes, sir.

Mr. Drewes: At this time, your Honor, the Government offers the affidavit, copy of an affidavit which has been identified by the witness, as Government's Exhibit next in order.

The Court: Counsel, will you examine it?

Mr. Hagerty: We have examined it, yes. We have no objection.

The Court: This is a copy of an affidavit signed by Milton Howard Olender.

You signed the original of this, Mr. Olender?

A. Yes, I did.

The Court: And it was subscribed to and sworn to before a notary public?

A. Yes, I believe it was.

The Court: Do you wish to make this a conformed copy of an affidavit? This isn't conformed to the original.

Mr. Drewes: That is a copy. The original is in the files [427] of the Bureau.

The Court: It isn't a copy to the extent that it is a conformed copy. There is no signature and

(Testimony of Milton H. Olender.)

neither does the notary appear. If you wish to conform it you may do so for the purpose of the record. As it stands now, it is not a conformed copy.

Mr. Drewes: Well, then, your Honor, may it be lodged with the Clerk and that will be done?

The Court: All right.

Q. (By Mr. Drewes): Mr. Olender, in what year did your late father die? A. 1940.

Q. And where was his estate probated?

A. I am not sure but I believe in the City and County of Los Angeles.

Q. Did you act as the accountant for your late father's estate, Mr. Olender?

A. I did some of the work.

Q. And did you receive a fee from the personal representatives of your father for that work?

A. I did.

Q. State, if you will, what work you did as an accountant in connection with your father's estate, Mr. Olender?

A. The bills call it accounting work. It actually wasn't accounting work. I went to the appraiser, Mr. Walker, in [428] Fresno. I think he was the Estate or the Federal, and I also went to the—whichever one it was, I went to both appraisers—and I had to leave my business in Oakland and I had many conferences with them in trying to determine the value of the various properties which my father had left, and it was mainly in line of that kind of work that I was paid. It wasn't accounting work. I did very little accounting work,

(Testimony of Milton H. Olender.)

although the fees may have been called accounting work.

Q. Did you consult with employees of the Bureau of Internal Revenue in connection with that estate? A. I don't remember that.

Q. Did you prepare the returns in that estate?

A. What returns?

Q. The estate tax returns?

A. No, sir, I did not.

Q. Who did?

A. I don't know. I believe—this is only a guess—Sidney Reed and Company of Los Angeles.

Q. State if you know who furnished the information upon which that estate tax return was prepared? A. The executors or executrixes.

Q. Who were they?

A. My mother and my sister.

Q. And did you furnish any information? [429]

A. No, not to my knowledge.

Q. Did you examine the return before it was filed? A. No, sir.

Q. Did the executrixes ask you many questions in connection with the details of it?

A. Not that I remember.

Q. You have testified that you had many conferences with the inheritance tax appraisers?

A. Yes.

Q. The subject of those conferences was the value to be put on the estate for inheritance tax?

A. No, I only—

Q. What was the—

(Testimony of Milton H. Olender.)

Mr. Hagerty: I will object to this entire line of questioning. It runs into collateral impeachment and I think we are going far afield.

The Court: Overruled.

A. What was your question?

Mr. Drewes: Read it, Mr. Reporter, please.

(Question was read.)

Q. (By Mr. Drewes): What was the subject of the conferences which you had with the inheritance tax appraisers?

A. They were the Olender Building in Los Angeles, the Olender building in Fresno, the Riverdale ranch, the McKinley ranch, the E Street house, and I guess that is all [430] the properties, and it was trying to get an evaluation on the properties. In other words, the higher the evaluation, the higher the tax that you paid on inheritance, and the lower you got it—and we tried our best to get as low an evaluation as possible, and that was the work that I did.

Q. The conferences were held, I take it, with the California state officials?

A. It may have been, I don't remember whether I held it with the State or Federal. I know Mr. Ben Walker was the man that I held several conferences with and he was either federal or State, I don't remember.

Q. Mr. Olender, I noted in your description of the subject matter of discussions you referred only

(Testimony of Milton H. Olender.)

to real property. Didn't you have any discussions with respect to personal property?

A. I did not.

Q. Did the inheritance tax attorneys ask you any questions about the personal property?

A. No, sir, they did not, not to my recollection.

Q. Any questions concerning the amount of and number of stocks and bonds that stood in his name?

A. All of that was taken down at the time of my father's death, all of his stocks and bonds and so forth were in his safe deposit box, and a gentleman from the State or federal, [431] I don't know which, wrote those down in great detail and they had all of that.

Q. No one asked you at any time, Mr. Olender, as to the amount of cash in banks or elsewhere that your father held at the time of his death?

A. All the cash in the banks was in his estate report.

Mr. Drewes: May that be stricken, your Honor, as not responsive?

The Court: That may go out. The question was, did anyone ask you?

Q. (By Mr. Drewes): Did anyone ask you?

A. No, sir.

Q. As to the amount of cash that your father had in banks or otherwise? A. No, sir.

Q. At the time of his death? A. No, sir.

Q. You testified, Mr. Olender, as to a large sum of money, \$75,000, that was in a vault in Fresno at the time of your father's death. State if you know if that was included on his estate tax return?

(Testimony of Milton H. Olender.)

A. It was not.

Q. How do you know that?

A. I have looked at it since. It is not on there.

Q. You have looked at the estate tax [432] return?
A. Yes, since then.

Q. That was after it was filed?

A. Yes, many years after.

Q. You never saw the tax return before it was filed?

A. No, sir, not that I remember. I may have seen it to sign it, but I don't remember the details of it.

Q. Did anyone ever question you in connection with the preparation of your father's—strike that. Did anyone ever question you in connection with the probate of your father's estate or the preparation of federal tax return as to whether you had received any gifts from your father prior to his death?
A. Not to my knowledge.

Q. I take it your testimony is that the estate was probated and the tax returns were filed with no reference to you whatsoever as the source of information?

A. As far as I remember it, that's 12 years ago, Mr. Drewes.

Q. Did you volunteer any information?

A. No, sir.

Q. To the personal representatives of your father as to any assets which your father had on hand or as to any gifts which he made to you?

A. That is a double question.

(Testimony of Milton H. Olender.)

Q. I just referred to two subjects. Did you volunteer the [433] information?

A. I volunteered information as to his assets, yes.

Q. As to cash on hand or gifts made to you? I will rephrase it. Did you volunteer any information to the personal representatives of your father concerning cash which your father had on hand at the time of his death or gifts made to you prior to his death?

A. Who do you mean by personal representatives of my father?

Q. The executors or the executrixes of the estate?

A. Well, one of the executors or executrixes was my mother. The other was my sister. I didn't volunteer anything to them, no.

Q. Did your sister know that your father had \$75,000 in the vault in Fresno?

A. She did not.

Q. Did your sister know that your father had made gifts to you in the amount of \$5,000 a year for a period of ten years before his death?

A. She did not.

Q. Did your mother know that your father had \$75,000 in a vault in Fresno at the time?

A. She did.

Q. And did she know that your father had made gifts of \$5,000 a year to you for a period of ten years before his [434] death?

A. She did.

Q. Did Mr. Reed, the accountant for the estate,

(Testimony of Milton H. Olender.)

have that information? A. I do not know.

Q. You testified that you received fees as an accountant for the estate of your father?

A. Yes.

Q. Do you remember when you received those fees?

A. Oh, they could have been in '41 or '42. I am not sure of the years. They are reflected in my income tax return.

Q. Do you remember the amount that you received?

A. I believe it was \$1,900. I am not sure.

Q. And you say that was, whatever the sum was, was— A. It was reported in my income.

Q. —reported on your return?

A. Yes, sir.

The Court: From whom and under what circumstances were those fees received? Will you answer that?

A. I believe they came from the estate.

The Court: It isn't clear in my mind. It may be in the jurors. But it isn't clear in my mind the circumstances under which you were paid the moneys and by whom or from whom you received the moneys and the attendant circumstances of the accounting details. What did you do, and what were the [435] services you rendered and for whom were the services rendered?

A. I stated the services rendered, your Honor, a short time ago.

The Court: I may have missed that.

(Testimony of Milton H. Olender.)

A. They were chiefly with the appraisers.

The Court: Who were the appraisers?

A. Mr. Ben Walker is the only one I remember. I am sure there was another one.

The Court: Where was his office?

A. In the Security Bank building in Fresno. I believe he is still there.

The Court: I see.

Q. (By Mr. Drewes): The fees that you have testified—

A. I will answer the Judge's question.

The Court: I just wanted a general picture in mind. I may have overlooked it. Who prepared the federal estate tax return?

A. You mean the return to the Government, not the income tax return?

The Court: No, in connection with the probate of an estate there is an inventory filed. Do you know?

A. Yes.

The Court: You helped compile the inventory, did you?

A. No, I did not. [436]

The Court: How did you help the appraisers?

A. By getting the figures down to where we wanted them down to. That was during their—this is still 1940 and this inflationary period hadn't started yet, and I was able to get the figure down so that we won't have to pay too large a tax on the building. I think we got very low values on all of

(Testimony of Milton H. Olender.)

the properties, which, of course, later when we sell them which we reflect in profits.

Q. (By Mr. Drewes): Mr. Olender, in the course of your conferences with the inheritance tax appraisers, to which you have testified, did you tell them at any time that your father had \$75,000 in the vault in Fresno?

A. I wasn't talking to them about what my father——

Mr. Drewes: May that be stricken as not responsive?

The Court: That may go out.

A. No, I did not.

Mr. Drewes: Just answer the question.

Q. Did you at any time tell them that you had received gifts in the amount of \$5,000 for a period of ten years prior to your father's death?

A. No, I did not.

Q. You have testified that you did not see the estate tax return of your father?

A. Not to my recollection.

Q. Before it was filed? [437]

A. Not to my recollection. I may have. I don't remember it, because I had nothing to do with the preparation of it.

Q. It was not submitted to you?

A. No, sir.

Q. By the accountant, whoever did prepare it before it was filed?

A. I was in Oakland. They were in Los Angeles.

(Testimony of Milton H. Olender.)

Q. You did not go over the return or discuss it with your sister or your mother before it was filed?

A. Not to my knowledge.

Q. To the best of your recollection when did you first see the estate tax return?

A. When this thing started.

Q. Would you be a little more definite? Give me an approximate date.

A. 1948, I believe.

Q. State, if you recall, whether that return includes the \$75,000 which you have testified your father had in the vault in Fresno?

A. I do not believe it did.

Q. Have you taken any steps since you first made that discovery, Mr. Olender, to see that an amended return was filed?

A. I have had no opportunity to do that.

Q. Since 1948? [438]

A. No, sir.

Q. State, if you recall, whether that return reflects any gifts as having been made by the decedent prior to his death?

A. I do not know. I don't remember.

Mr. Drewes: I have here, your Honor, an estate tax return of the decedent, Julius Olender.

The Court: Is that the State or Federal estate?

Mr. Drewes: Federal estate tax return.

(Discussion between counsel.)

Mr. Drewes: Yes, it is stipulated in may go into evidence.

Mr. Hagerty: Yes, we have no objection to it.

The Court: It may be marked in evidence.

(Testimony of Milton H. Olender.)

The Clerk: U. S. Exhibit No. 46 in evidence.

(Federal Estate Tax Return of Julius Olender received in evidence and marked U. S. Exhibit No. 46.)

Q. (By Mr. Drewes): Mr. Olender, I show you what has been admitted as the Government's Exhibit 46, the estate tax return of your late father and ask you to turn to the next to the last page where you will see two affidavits, and I will ask you if you can identify the signatures on those affidavits?

A. I can identify the signature of my mother only. I do not know the signature of the other [439] party.

Q. What is the name that appears?

A. Sidney R. Reed.

Q. You don't recognize that signature?

A. No, I do not.

Q. Do you know who he is?

A. Only that he is an accountant in the City of Los Angeles.

Mr. Drewes: Thank you. With the Court's permission—this is a rather long document, and I wish to call the attention of the Jury, for my purposes, just to two or three items therein. May I do that?

The Court: Certainly.

Mr. Drewes: Rather than hand the document to the jurors. It will take too much time.

Mr. Hagerty: We have no objection, your Honor.

Mr. Drewes: Thank you, Mr. Hagerty.

(Testimony of Milton H. Olender.)

This document has already been identified for you and there are one or two references that I wish to make to it as I just indicated to the Court.

Under Schedule D there appears a series of questions to be filled out by whomever is preparing and submitting this return, No. 3 of which is as follows:

“Did the decedent at any time make a transfer of an amount of \$5,000 or more without an adequate and full consideration in money or money’s [440] worth but not believed to be includable in the gross estate as indicated in the first paragraph (including six sub-paragraphs) of the instructions of this schedule?”

“Answer ‘yes’ or ‘no.’”

And the answer appears there as “No.”

Secondly, under Schedule J, provides for a listing of the funeral and administration expenses of the estate, and under item 2 appears the following:

“Milton H. Olender, 1026 Broadway, Oakland, California, accountant’s fees. Paid on December 2, 1940, \$1,500. Estimated additional fees to closing of estate, \$500.”

Now, immediately thereunder, as item 3, appears the following:

“Sidney R. Reed, 608 South Hill Street. Los Angeles, California, accountant’s fees, \$100.”

Thirdly, there appears under Schedule K. “Debts of Decedent,” a very long list, including 46 items. I have examined it and nowhere therein is any ref-

(Testimony of Milton H. Olender.)

erence made of any debt of the decedent to the defendant, Milton Olender.

Mr. Hagerty: If your Honor please, I will move to strike that as being a statement on the part of the attorney, the prosecutor. The document speaks for itself. [441]

Mr. Drewes: If that is not correct, counsel may call that to the attention of the jury.

The Court: If that is a correct statement, it may be received. If it is incorrect, it may be corrected by counsel. I assume that counsel is reading correctly.

Mr. Drewes: I couldn't find any such entry.

Mr. Hagerty: Well, I will take Mr. Drewes' reading of it.

The Court: Could I read it, please? (Examining document.)

This document appears to have been prepared by Sidney R. Reed, Fox Building, Los Angeles, California.

Was it prepared in its entirety by Mr. Reed?

A. I wouldn't know, sir. None of it was done by me.

The Court: May I ask you whether or not you were ever called into the offices of the attorneys who were preparing the papers incidental to the probate of the estate and who were actually probating the estate of your late father?

A. The attorney was my sister and she never

Q. Your sister was the attorney? A. Yes.

(Testimony of Milton H. Olender.)

The Court: She probated the estate?

A. I don't know. I don't know any of those legal——

The Court: Who were the attorneys of record in the [442] matter?

Mr. Hagerty: I don't know.

Mr. Drewes: I believe that is correct. The sister was an attorney admitted to practice. She is shown as being the attorney for the estate. Is that correct, to the best of your knowledge (directed to counsel)?

Mr. Hagerty: I don't know.

The Court: Mollie Olender, executrix—that was your mother? A. Yes, sir.

The Court: And your sister was the attorney. What was her first name?

A. Terrys Olender Gambord.

The Court: She is admitted to practice law?

A. She is a formerly deputy district attorney of Los Angeles.

The Court: And she probated this estate?

A. Yes.

The Court: Yes. I see her, Terrys Olender Gambord, attorney's fees for services.

Q. (By Mr. Drewes): Mr. Olender, state if you know where your sister, Mrs. Terrys Gambord, can be located?

A. I don't know. She has a post office box. I haven't seen my sister in many, many months.

Q. Mr. Olender, have you ever filed Federal gift tax returns [443] in connection with the gifts of

(Testimony of Milton H. Olender.)

\$5,000 from your father between the years received by you, between the years 1940 and '50, as you testified to? A. No, sir.

Q. State if you know whether your father or anyone on his behalf filed such returns?

A. I didn't and I don't know if anyone did on his behalf.

Q. Your answer is you don't know whether they were filed? A. I don't know.

Q. Now, Mr. Olender, you were in Court when Mr. Ringo testified that he did certain work for you in connection with the preparation of comparative net worth statements, and he testified, as I recall, that preparatory to doing so he wrote out a number of questions in his own handwriting and submitted them to you for your answers. Do you recall that testimony? A. Yes.

Mr. Hagerty: If your Honor please, it is just about the recess. In reference to this line of testimony I would like to renew some motions and argue the point.

The Court: All right.

The Jury may recess. The same admonition.

I will hear counsel in this matter.

(The following proceedings were had outside the presence of the Jury):

Mr. Hagerty: At this time, your Honor, it is apparent [444] that the Government is going to go into this question of communications again between the defendant and Mr. Ringo. In the light of the

(Testimony of Milton H. Olender.)

testimony of the defendant, which has added to prior evidence in the record, we think that we have established clearly the existence of a relationship of attorney and client.

The defendant wanted someone who could give him legal counsel in reference to his tax problems. He wanted that person also to be familiar and exercised in the field of accounting. He searched for such a man and was recommended to such a man through Mr. Reinhard, who so testified here on the stand.

He went to the Sargent Company. He talked to Mr. Sargent and asked to have Mr. Ringo sent to him.

In his preliminary discussions with Mr. Ringo he established that he was an attorney, that he could advise him in reference to the existing problems, and that he would also work out whatever accounting features he had to have to meet those problems.

Under all the circumstances we feel that the relationship of attorney and client was clearly established at that time and that any exchange of information between the two is in the nature of a privileged communication. And on that basis we again renew our motion to strike the testimony of the witness, Ringo, with reference to communications received [445] from him by the defendant or vice versa and we would object to any further inquiry along that line.

Mr. Drewes: The Government's position is, as it

(Testimony of Milton H. Olender.)

has been before, it makes little difference, is inconsequential as to what was in the defendant's mind, what he saw or what he wanted. The test is what was done, and the record is quite clear that the work done by Mr. Ringo was accountant's work.

I should also like to call your Honor's attention to a bit of testimony this morning. The defendant testified that one of the reasons he wanted an attorney was because he wanted to, as much as possible, I take it, keep out of this entire chain of events any reference to his mother's affairs, which struck me as being very interesting because the defendant himself has testified on direct examination as to many transactions with his mother. He testified as to gifts received and trips that she made up here and any number of things.

Mr. Hagerty: Might I answer that, your Honor? The defendant's approach to that problem was that his mother was an elderly woman and in not too good health, approximately 70 years old, that he wanted an attorney in the picture to begin with to protect her from needless investigation and harassment that she was bound to be exposed to if he had only an accountant.

Mr. Drewes: Certainly there is absolutely nothing in the [446] record, your Honor, at this stage other than the defendant's statement as to what he intended and what he expected to support the ruling for which counsel contends. Mr. Ringo's work was an excellent preparation of comparative net worth statements which had been asked of the de-

(Testimony of Milton H. Olender.)

fendant by the Government. I say Mr. Ringo's testimony supports that.

Mr. Hagerty: If your Honor please, it stems all from a man's legal tax liability, which is a question of law, and in that he was seeking advice and he was seeking it from a man who was an attorney skilled in the field of determining and ascertaining from businesses what tax liability is. I think that the two subjects in a situation like this are so inseparably intertwined that he cannot segregate one from the other. I think that we have a legal situation, and there is no question about it, and the relationship of attorney and client naturally would exist.

The Court: What is this document that you are about to take up? Is this——

Mr. Hagerty: This is the proposed net worth, the questions and answers upon which Mr. Ringo prepared——

Mr. Drewes: These were the answers as to the cash in vaults, your Honor, which were submitted to Mr. Ringo in the defendant's own handwriting.

Mr. Hagerty: There is also another objection that might be urged, that may be more recondite at this stage but more [447] familiar to your Honor in the early days on the bench, that those written statements tend to be admissions of the defendant upon which extra-judicial admissions upon which the Government seeks to establish the corpus delicti of the offense, which was something that I stated

(Testimony of Milton H. Olender.)

very slightly when we first raised this objection in the initial stages of this trial.

Mr. Drewes: If your Honor please, my associate counsel just suggested another matter which I haven't urged upon the Court, but I think is persuasive to my way of thinking at least. The net worth statements which are in evidence were submitted to the Government by Mr. Ringo on behalf of the taxpayer. This is part of the information upon which those net worth statements were built and there has been testimony to that effect. So even if the relationship which counsel seeks to establish did exist clearly there must be a waiver.

The Court: I will overrule the objections and the renewed motion to strike is additionally denied.

Are there any other matters to take up?

(Discussion relating to testimony of Mr. Lerman.)

(Thereupon a short recess was taken.) [448]

Q. Mr. Olender, Mr. Ringo did give to you a list of questions written out in his handwriting concerning your assets at various dates, did he not?

A. He gave me many of those.

Q. And you returned them to him with your answers?

A. Some of them, yes.

Q. I will show you the Government's Exhibit number 45, heretofore admitted in evidence, and call your attention particularly to number 19, analysis of use of cash in vault, and ask you if this is a copy of one of the lists of questions submitted

(Testimony of Milton H. Olender.)

to you by Mr. Ringo? A. I believe it is.

Q. And with respect to item number 19, analysis of use of cash in vault, with respect to that item the figures \$6,000, \$19,000, \$42,000, \$7,200, a line and the total figure \$75,000 appears. Is that in your handwriting?

A. Frankly, it does not look like it.

Q. Do you recognize the handwriting?

A. No, I don't.

Q. Let me see the Exhibit again, please. You will note this Exhibit has the figures which I read after the dates shown as follows:

Decrease in 1943, \$6,000. Decrease in 1944 (Goodman deal), \$19,000. Decrease in 1945, \$42,800. Decrease in 1946, \$7,200, and then the total, \$75,000. The total refers [449] to cash in vault brought by you from Fresno to Oakland following your father's death, is that not true? A. I do not know.

The Court: What was the last question?

(Question read by reporter.)

Q. (By Mr. Drewes): Do those figures have any meaning to you at all? A. They do not.

Q. Have you ever seen the original of that document that is in front of you?

A. It has been six years since——

Q. Answer my question.

A. I don't remember. I have evidently seen it. There is some of my handwriting on it so I must have seen it.

Q. State, if you know, where the original is?

(Testimony of Milton H. Olender.)

A. No, I don't.

Q. Do you have any—strike that.

Mr. Drewes: Will your Honor ask counsel for the defendant if they have in their possession the original of Government's Exhibit number 45?

The Court: You ask them.

Mr. Lewis: I have the original. Here it is.

Q. (By Mr. Drewes): Mr. Olender, your counsel has just handed me a document consisting of three sheets of yellow paper of legal size and a small pink piece of paper stapled [450] together, the first three pages are numbered and the name, Milton H. Olender, appears on the first line of the first page. I will ask you to examine this document and tell me if you recognize it?

A. Well, I don't recognize it, Mr. Drewes, but I must have seen it because there is some of my handwriting on it.

Q. That document consists, for the most part, of a series of questions, does it not, written out in pencil and numbered? A. Yes.

Q. And opposite most of those questions, do there not appear figures? A. Yes.

Q. And in whose handwriting are those figures?

A. They are not mine.

Q. None of them are yours?

A. Oh, yes, the ones on the left-hand side, not the ones on the right-hand side. These (indicating). All along this side, these figures here.

Q. You are referring to figures and letters which are in green ink? A. That is right.

(Testimony of Milton H. Olender.)

Q. Those you identify as yours?

A. I don't know if all of them are mine. I know some of them are. Everything here in green ink is mine— [451] this is not mine in green ink. Everything here in green ink is mine, and this in green ink is mine. This is not mine. This is not mine (indicating).

Q. And the numerals in pencil which appear at the right of each one of those questions, you state that those are not yours?

A. They are positively not my handwriting, no, sir.

Q. And you have no recollection of seeing that document before?

A. No, I haven't. I have no recollection at all. I gave him many, many documents.

Q. You don't—

A. I don't recall this one at all, no, sir.

Q. You don't recall giving to Mr. Ringo the information which has been put thereon in pencil in numerals?

A. No, I don't.

Q. And referring specifically to item number 19, the figures which total \$75,000, you have no recollection of giving that information to Mr. Ringo?

A. No, I have none whatsoever. I worked with Mr. Ringo for many months.

Q. I will show you the Government's Exhibit number 25, which is a comparative net worth statement of yourself as of December 31, 1947, and the same date in 1941, and I will call your attention to this item appearing thereon, [452] "Cash in vault."

(Testimony of Milton H. Olender.)

What is the figure for 1941? A. \$75,000.

Q. Does that refresh your recollection as to the information which appears in item 19 of the Government's Exhibit number 45?

A. No, it doesn't.

Q. I am going to show you again, Mr. Olender, the Defendant's Exhibit number P which is the partnership return for 1946 including the schedule A attached thereto. You have testified that the schedule, I believe, is a duplicate original prepared by you?

A. Yes, sir.

Q. Where was it prepared, Mr. Olender?

A. In Oakland.

Q. When was it prepared?

A. In the early part of 1947.

Q. When you say it was prepared in Oakland, could you be more specific? Was it your place of business or——

A. Yes.

Q. At your place of business?

A. Yes, I believe so, or at home, either one.

Q. Either place? A. I am not sure.

Q. How many copies did you make? You stated that you had to make a number, if you recall. [453]

A. I don't remember specifically. I usually made a copy for each partner in the thing. As you notice, there are five or six names there—one for my mother, one for my sister, one for me, and one for my two cousins, and then one for the Government.

Q. I note that the schedule and the return were prepared on a typewriter?

A. Yes, sir.

(Testimony of Milton H. Olender.)

Q. Was that typewriter in your place of business or at your home?

A. Could have been in either place. I had two typewriters.

Q. Was the schedule and the return itself prepared on the same typewriter?

A. I don't know.

Q. Do you have any recollection?

A. I haven't the slightest recollection of where I did the return.

Q. Did you prepare the return and the schedule at the same time?

A. I might not have. I might have made the schedule much later.

Q. For approximately what period of time did the partnership own the Riverdale ranch?

A. That goes back prior to this partnership. It was originally [454] owned by my father and my uncle, the original Olender partnership, J. and S. Olender.

Q. When did this partnership acquire the Riverdale ranch?

A. Mr. Drewes, this isn't actually a partnership. I don't know what you would call it. It is a joint tenancy or ownership in common, or something of that sort. But two of the owners of this property acquired their one-half interest—one-fourth each, the two daughters of S. Olender when he passed away, I believe, in 1933. Then in 1940 when my father passed away my mother originally had one-half of that, or we will say three-sixths, and I was

(Testimony of Milton H. Olender.)

given one-sixth and my sister one-sixth and my mother took one-sixth so that there were three-sixths on our side and three-sixths on the side of the other two.

Q. And when did the second partnership—we will use that term for want of a better one—acquire the Riverdale ranch?

A. When the estate of my father was finally probated.

Q. Which was in 19—— A. '42, I believe.

Q. Mr. Olender, did you take depreciation on the Riverdale ranch during the time that was held by the partnership?

A. There was nothing to depreciate.

Q. Did you ever take depreciation as a deduction on the [455] returns?

A. In the early years of the partnership when it was owned by my father there was bonds and certain properties which finally collapsed, and were gone when we acquired the property. There was nothing but land.

Q. I show you, Mr. Olender, Government's Exhibit number 24 for identification, particularly with respect to Exhibit 7, Schedule A. You testified this morning, Mr. Olender, that that schedule, represents gifts from your mother to yourself, is that correct?

A. Yes, sir.

Q. And I note that the schedule is entitled, "Withdrawals from savings accounts in Fresno." What is meant by that, Mr. Olender?

A. That is where the funds came from.

(Testimony of Milton H. Olender.)

Q. From what savings accounts in Fresno?

A. She had two savings accounts in Fresno.

Q. Where were they?

A. One in the Bank of America, one in the Security First National Bank.

Q. And where, for example, in the first item where the date is shown as February 3, 1942, and the amount of \$1,000, does that mean that there was a withdrawal from one or the other of those two banks on that date?

A. Yes. [456]

Q. And in that amount?

A. Yes.

Q. And on March 31, 1943, your mother withdrew \$1,000 as a gift to you?

A. Yes.

Q. And withdrew it from one or the other of those two banks?

A. Yes.

Q. Similarly on January 6, 1944, she withdrew \$2,000 from one or the other of those two accounts and gave it to you?

A. Yes, sir.

Q. What disposition did you make of those funds, if you recall?

A. Some of it I put in my safe deposit box, some I used in other ways.

Q. Well, now, you state that you put it in your safe deposit vault. In what form?

A. Currency.

Q. She made the withdrawal and gave it to you in currency?

A. Yes.

Q. On July 5, 1944, did she withdraw \$2,500 from either one of those two accounts and give it to you?

A. It says so in there.

Q. Was that true? [457]

A. Yes.

(Testimony of Milton H. Olender.)

Q. And on December 5, 1944, she withdrew \$1,000? A. December 15.

Q. I beg your pardon, you are correct.

A. Yes.

Q. And on January 2, 1945, she withdrew \$3,000 from either one of those two accounts and gave it to you in currency? A. Yes, sir.

Q. In every case it was in currency?

A. Yes, sir.

Q. And you put it in your safe deposit vault or made some——

A. I don't know where I put it. I put it somewhere.

Q. Other than your safe deposit vault, where would you have put it?

A. I might have deposited it in one of my accounts, I am not sure.

Q. Would your bank records show deposits of those sums as of any of those dates?

A. They may or may not, I don't know.

Q. You could examine your records for us, couldn't you, and let us know?

A. Yes, I could. I haven't.

Q. But there is no question in your mind that with respect to Exhibit 7 which is in front of you as to each one of [458] those amounts your mother withdrew that sum from either one of the two banks which you have designated on the dates shown and gave the money to you in cash?

A. I am not positive that the money that came out of those banks was given to me. She may have

(Testimony of Milton H. Olender.)

taken money those same dates from some other place, but she definitely withdrew that amount of money on those dates either from the bank or some other bank and gave the money to me. But there are positive withdrawals on that date, and I checked with my mother to make sure they are correct.

Q. There are positive withdrawals on each one of those dates? A. Yes.

Q. And the money was given to you?

A. Yes.

Q. Mr. Olender, I will show you the Government's Exhibit number 24 which again consists of your comparative net worth statements as of December 31, 1941, and 1947, and I will call your attention to the item appearing in 1947, "Single premium life insurance policy, \$15,833.46," and you will note that there is an asterisk there, and down below the following appears, "Personal check to the Bank of America, dated June 5, 1945, for \$15,833.46," the amount paid for the policy. Then the following, "Check number 2396 for \$15,000 transferred from the business bank account to [459] the personal bank account of Milton Olender and deposited in his account for this transaction on June 4, 1945." Do I understand that, Mr. Olender, to mean that of the \$15,833.46, which was paid for that policy, you took \$15,000 out of your business account and deposited that sum in your personal account, is that correct?

A. To the best of my knowledge, it is.

(Testimony of Milton H. Olender.)

Q. Then how did you pay for the policy? That doesn't appear. Let me rephrase that to help you along here. I understand that in explanation of that item you have put down here that check number 2396 in the amount of \$15,000 was taken from your business account and put in the personal account for the purpose of acquiring that policy. Now, how did you pay for the policy?

A. I am not sure of this. I believe that I purchased a cashier's check with that \$15,833.46. A personal check was issued, and a cashier's check was purchased for it, I am not sure.

Q. Your best recollection is that you drew another check on your personal account and with that you purchased a cashier's check, is that your testimony?

A. I don't know just how this thing—it is a little mixed up here. The check from my business was first put in my personal account to make up that sum, and then a check from my personal account was issued, and, I believe, to the Bank of America, I am not sure, and they issued me a [460] cashier's check which I tendered to the New York Life Insurance Company.

Q. Is that to the best of your recollection?

A. That is the best of my recollection.

Q. Why didn't you just draw a check on your personal account payable to the insurer?

A. I don't know.

Q. Mr. Olender, you testified this morning that you received from your mother-in-law, Mrs. Foote,

(Testimony of Milton H. Olender.)

the sum of \$2,500? A. That is right.

Q. When did you receive that money?

A. In 1945.

Q. Why was that money given to you by Mrs. Foote?

A. For a very specific purpose.

Q. I recall your so testifying this morning. What was the purpose?

A. For her grandson to purchase his home with.

Q. And how long did you hold that \$2,500?

A. Oh, a few months after she passed away.

Q. And when was that?

A. She passed away in August of 1945.

Q. And you received the money shortly before her death?

A. Some time before her death, yes.

Q. What did you do with the money? [461]

A. I kept it until December, and then deposited it with some other funds in my wife's bank account. I opened the bank account with that money.

Q. And you say it was for the purpose of purchasing a home for your——

A. For a down payment.

Q. For her grandson?

A. For her grandson and my wife's son.

Q. Would that have been your——

A. My stepson.

Q. I was about to ask you whether it was your son or your wife's son by her earlier marriage. During what period of time did Mrs. Foote live with you?

A. From 1924, the date of my marriage, until

(Testimony of Milton H. Olender.)

about 1938 or '9, I am not sure of the last year. She lived with me constantly except for short trips to visit some of her other daughters.

Q. Where did Mrs. Foote go at the time she left your home in 1938?

A. Mrs. Widrin, her daughter, who appeared here as a witness, purchased a home for her in Fresno in one of those years, 1938, '9, '40.

Q. Mrs. Widrin?

A. I am not sure of the year. I know Mrs. Widrin purchased a home for her, but when, I don't know. [462]

Q. State, if you know, did Mrs. Foote live there alone thereafter?

A. Yes, but her daughter, another daughter, lived right next door to her.

Q. In what form did you receive the \$2,500, Mr. Olender? A. Currency.

Q. Where were you when she gave you the currency? A. In Oakland.

Q. I mean specifically. Was it in your home or—

A. I don't remember, I believe in my home, yes.

Q. Did you give that sum of \$2,500 subsequently to your wife to deposit in her account, or did you do it? A. I believe I did it.

Q. I will show you the Government's Exhibit number 15 which is the stipulation admitted in evidence in this matter and I call your attention particularly to the second page under, "Cash in banks," the item, "Mrs. Betty Olender," and for the years

(Testimony of Milton H. Olender.)

1944, nothing; 1945, \$5,000, and for the year '46, \$10,070.06. A. Where is it?

Q. It is right here, \$10,070.06. There has been testimony you will recall, that that particular bank account was left off the net worth statement submitted to the Bureau of Internal Revenue by yourself or your agents, is that correct? [463]

A. That is correct.

Q. Do you remember, Mr. Olender, discussing that particular account to which I have called your attention on or about the 18th of October, 1948, in the presence of Mr. Whiteside and Mr. Root in Mr. Root's office in Oakland, California?

A. I remember I had a conference in there with them.

Q. And at that time and place do you remember telling Mr. Whiteside and Mr. Root that you received \$3,000 from Mrs. Foote in order to enable her to qualify for old age benefits?

A. I never said that.

Q. And that you put that sum of \$3,000 in your safe deposit vault and that following the death of Mrs. Foote you put that sum of \$3,000 in Mrs. Olender's account, Mrs. Betty Olender's account, that is your wife. Did you at that time and place and in the presence of those persons make those statements?

A. Not that first one. I don't remember about the second, certainly nothing about Mrs. Foote's pension.

Q. Mr. Olender, state if you know, whether your

(Testimony of Milton H. Olender.)

wife, Betty Olender, made a sworn statement to the Fresno County Department of Public Welfare in connection with Mrs. Foote's application for old age benefits?

Mr. Hagerty: If your Honor please, this is traveling far afield apparently on a collateral matter of impeachment. I am going to object to it being incompetent, irrelevant [464] and immaterial. Whatever was done outside here is not binding upon this defendant.

The Court: Well, did he know? The question is did he know of the filing with the Welfare Board of the documents or any applications made by your wife on her behalf?

The Witness: I know that Mrs. Foote was ultimately on pension from the State of California, but I don't remember whether my wife signed that or not. She might have.

Q. (By Mr. Drewes): I asked you, Mr. Olender, whether you had recollection of a conference which took place on October 18, 1948, in the offices of Mr. Root? A. Mr. Root alone?

Q. At which conference Mr. Whiteside was present?

A. I don't know if that was the date. I know I had a conference at one time or another.

Q. Do you recall if then Mr. Monroe Friedman was present?

A. He might have been, I don't remember.

Mr. Drewes: I see that it is four o'clock, your

(Testimony of Milton H. Olender.)

Honor. This is an appropriate place for my examination in which to recess.

The Court: We will take the afternoon adjournment, ladies and gentlemen, with the same admonition not to discuss the case or form an opinion until it is finally submitted to you.

(Thereupon Court was adjourned until Wednesday, September 24, 1952, at 10 o'clock a.m.) [465]

September 24, 1952—10:00 A.M.

The Clerk: United States of America vs. Olender on trial.

Mr. Lewis: Your Honor, we have excluded witnesses, but I have talked with Mr. Drewes, and we have our accountant in the courtroom and he says it is all right.

MILTON H. OLENDER

the defendant herein, resumed the stand, and having been previously duly sworn, testified further as follows:

The Clerk: Mr. Olender, will you restate your name for the record?

A. Milton Olender.

Cross-Examination

(Resumed)

By Mr. Drewes:

Q. It has been called to my attention that yesterday I asked you if you had filed gift tax returns

(Testimony of Milton H. Olender.)

with respect to the \$5,000 per year which you have testified your father put in the vault at Fresno between the years 1940 and 1950. I meant to state between the years 1930 and 1940.

A. The answer is the same.

Q. The answer is the same. And the answer as to your father having filed, your answer is the same? A. Yes. [466]

Q. Mr. Olender, I show you again the defendant's Exhibit P in evidence which has been identified as the partnership return for the year 1946, together with the schedule which you have identified. With particular reference to the sale of the Riverdale Ranch property, Mr. Olender, for what price was the ranch sold? A. \$20,000.

Q. And with particular reference to the schedule which you have before you, what is the cost basis shown? A. \$20,000.

Q. And what interest did you have in that property? A. One-sixth.

Q. Well, I asked you yesterday, Mr. Olender, if it were not true that you had taken depreciation on that property and you answered that you had not. Is your answer still the same?

A. Do you mean during the time that I owned the property?

Q. During the time that you had a one-sixth interest in 1945, '44, '43, '42?

A. I have no knowledge of any depreciation being taken. I have no remembrance of it.

(Testimony of Milton H. Olender.)

Q. You testified that you prepared the returns, your own returns, for those years?

A. All the depreciation would have been shown on my own returns.

Q. I now hand you the Government's Exhibits 1, 9, 7 and 5, [467] which are your returns for the years 1942, '43, '44 and '45. I will ask you to examine them with particular reference to the schedules thereon and state if it is not a fact that in each year depreciation is shown as a deduction for the Riverdale Ranch property?

Mr. Hagerty: I will object to that, your Honor, on the grounds that the returns speak for themselves.

The Court: Overruled.

Q. (By Mr. Drewes): You will find the schedules on the last page in most instances, Mr. Olender.

A. There is a small item of depreciation on there.

Q. In each year?

A. I have only looked at one.

Q. Please examine the others. You will find the schedules in approximately the same place in each return, and I think you will find the items approximately the same in each return.

A. There is a depreciation item of \$72 each year.

Q. Thank you. You have testified that the Riverdale Ranch was sold for \$20,000. You had a one-sixth interest there.

A. That's correct.

(Testimony of Milton H. Olender.)

Q. That one-sixth interest would represent a value of \$3,666 to you, is that correct?

A. I am not sure of that figure. It was one-sixth of \$20,000. [468]

Q. One-sixth of \$20,000? A. Yes.

Q. All right. You testified that in connection with your work as accountant for your father's estate you were engaged primarily in valuation work, and that your efforts consisted primarily of conferences with the inheritance tax appraisers for the purpose of establishing the value of real property for estate purposes, is that correct?

A. As far as I remember.

Q. I now show you the Government Exhibit No. 46 in evidence, which is the estate tax return filed in the matter of your late father's estate, and call your attention primarily to Schedule A, Real Estate, Item 3, and ask you to state the value shown thereon with respect to the item?

A. \$3,950 for an undivided one-half interest.

Q. In what property?

A. In the Riverdale Ranch property.

Q. \$3,950 for one-half interest. Therefore the entire property would be valued at twice that figure or \$7,900, is that correct?

A. No, sir, it would not.

Q. It would not be? A. No, sir.

Q. You had a one-third interest in that?

A. One-sixth. [469]

Q. You had a one-third interest in that one-half, did you not? A. Yes.

(Testimony of Milton H. Olender.)

Q. What does the one-third interest in that one-half represent, according to that evaluation?

A. Thirteen hundred some odd dollars.

Q. \$1,316.66, is that correct? A. Yes, sir.

Mr. Drewes: Mr. Clerk, would you distribute to the jurors the charts that the defendant prepared yesterday?

(Documents were distributed to the Jury.)

Q. (By Mr. Drewes): Mr. Olender, as I understand your testimony on direct examination you purchased sailors' suits from one George Goodman early in 1944, is that correct?

A. Through Mr. Lewis Leavy.

Q. Mr. Leavy? A. Yes.

Q. And you paid therefor \$20,550, is that correct? A. That's correct.

Q. How was that payment made, Mr. Olender, in what form? A. In cashier's checks.

Q. How many were there?

A. I don't know. There were several, maybe five, six, seven or eight.

Q. And where did you buy those cashier's [470] checks?

A. In the Bank of America, 12th and Broadway, in Oakland.

Q. Mr. Olender, I have in my hand five sheets of paper, to which are affixed three applications for cashier's checks, and nine checks, all cashier's checks, drawn on the Bank of America, each payable to George Goodman, six of which are in the

(Testimony of Milton H. Olender.)

amount of \$2,250, and three of which are in the amount of \$2,350.

I will ask you to examine these and ask you—
examine them, please. A. Yes, sir.

Q. You have examined them? A. I have.

Q. I ask you if those refresh your recollection, if those appear to be copies of the nine checks which you sent to George Goodman in payment for the suits which you purchased from him in 1944 as you heretofore testified?

A. That's eight years ago, Mr. Drewes. They may be. I don't know if they are. But I couldn't be sure.

Q. Of the three applications, Mr. Olender, two, one dated January 10, 1944, and one dated January 22, 1944, bear signatures of the purchaser. I will ask you to examine those and tell me if those signatures appear to be your own?

A. They are. I am not denying these are mine. I am merely stating I don't know whether these are the checks or not. I applied for them. [471]

Q. Thank you. Where did you get the \$20,550 with which you purchased the Goodman suits, Mr. Olender?

A. I believe from my safe deposit box.

Q. Did you deposit that sum to your business account? A. I did not.

Q. You used that sum to purchase cashier's checks? A. I did.

Q. Why, Mr. Olender, did you not simply deposit the sum in your business account and send

(Testimony of Milton H. Olender.)

Mr. Goodman the check for the purchase of the suits in the ordinary way?

A. There was no assurance that I was going to get those suits whatsoever, and if I had given Mr. Goodman a check on my store he wouldn't have accepted it. He wanted cashier's checks. It was requested.

Q. Did you purchase cashier's checks for the purpose of keeping your name off the transaction?

A. No, sir. My name and the name of the store was on there.

Q. Did you enter those purchases on your books, Mr. Olender?

A. I did not at that time.

Q. Why did you not?

A. Because when the merchandise arrived, it was unsatisfactory and I wanted to return it immediately.

Q. When did the merchandise arrive, to the best of your [472] recollection?

A. I am not sure. They arrived in several shipments. I believe during the months of February and March, maybe even later.

Q. At the time that you purchased the goods from Mr. Goodman did you know that the goods were going to be unsatisfactory?

A. I did not. I did not know I was going to get the goods.

Q. Mr. Olender, did you receive invoices from Mr. Goodman covering these purchases?

A. I did not.

Q. You received none at all?

(Testimony of Milton H. Olender.)

A. None at all. I demanded them but I could not get them.

Q. Mr. Olender, what other purchases did you make of sailor suits in the year 1944?

A. From whom?

Q. From anyone.

A. I believe there were some suits bought from the Dorfman Hat & Cap Company.

Q. Mr. Olender, I am going to hand you defendant's Exhibits H, I, J, K and L in evidence, as your books of account, and ask you to refer to them and state what purchases of sailor suits were made by you in the year 1944 as reflected by your books?

A. I wouldn't know where to find them, Mr. Drewes. [473]

Q. You don't know where in your books?

A. No, sir, I don't. Sailor suits transactions would not be reflected in there. Merely the house that I bought from, and I bought hundreds of invoices from Dorfman, hundreds of invoices from many accounts.

Q. All I want to know, what purchases you made of sailor suits in 1944?

A. Well, I can't.

Q. Can't you tell me that?

A. I cannot tell from my books. I cannot tell from my books. I can tell from my invoices, not from my books.

Q. Didn't you enter your purchases in your books?

A. I did not do any entering in my books of any kind. Not a single line.

(Testimony of Milton H. Olender.)

Q. Were they entered in your books by someone else? A. Yes.

Q. Are you so totally unfamiliar with the books in front of you that you can't turn and tell me what sailor suits you bought in 1944?

A. No, I cannot. No. There is no way to identify them from my books. Only from my invoices.

Q. Where are your invoices?

A. In my store.

Q. You have the invoices in Court?

A. I can. [474]

Q. Do you have them in Court?

A. No, I haven't been asked to bring them in.

Q. Did you buy any sailor suits from Mr. Goodman in 1944 other than those to which you have testified? A. I did. I bought \$1,380 worth.

Q. How many suits were those?

A. I don't know. It's on the invoice. I don't remember.

Q. What suits did you buy in 1945 to the best of your recollection?

A. Why, I bought all the Saraga suits that have been in testimony. I don't know what others. I don't remember.

Q. Do you recall buying any sailor suits from Seagoing Company in 1945?

A. Yes, there is one invoice there, \$9,000, from Seagoing, I believe.

Q. The purchase from Saraga in 1945 was \$22,775? A. To the best of my knowledge.

Q. Is that correct? A. Yes.

(Testimony of Milton H. Olender.)

Q. I believe that has been testified to?

A. Yes.

Q. In 1945 did you make a purchase of sailor suits from one Joe Asman? A. Who?

Q. Joe Asman—(spelling)—A-s-m-a-n. [475]

A. The name doesn't register with me.

Q. How much did you pay for the suits that you brought from Goodman?

A. The price was \$25.

Q. But two hundred of those suits, I understand, were sold to Mr. Lerman?

A. Without my knowledge.

Q. By Mr. Leavy? A. Yes.

Q. Is that correct? A. Yes.

Q. And 280 suits were sold by Mr. Leavy for \$7,000? A. Approximately that.

Q. To whom were those suits sold?

A. I have no idea.

Q. Do you have any record at all?

A. No.

Q. The proceeds of the sale of the suits to Mr. Lerman in the amount of \$5,000 were credited to your capital account? A. That's correct.

Q. Is that correct? A. Yes.

Q. And then, if I recall your testimony, 342 suits were picked up in inventory in 1945, is that correct? A. I believe it was 322. [476]

Q. Didn't you testify that it was 342 but 20 of them were sold?

A. Yes, the statement here says that 322 suits were placed in inventory.

(Testimony of Milton H. Olender.)

Q. Why did you credit your capital account in the amount of \$5,000 with the proceeds of the Lerman sale?

A. Because I needed it in my business.

Q. Did your crediting the capital account, the proceeds of that sale, have any reference to the source of the money? A. No.

Q. Did you consider it as a new contribution, new capital contribution?

A. I don't know what I considered it as.

Q. It was capital which theretofore had not been in your business? A. That's right.

Q. Therefore you credited the capital account?

A. That's correct.

Q. Is that correct?

A. Credited it to my capital account.

Q. Did you credit your capital account when you picked up the 342 suits in inventory?

A. I don't know.

Q. Will you refer to your books and see if there is a credit to the capital account? [477]

A. I wouldn't know where to look for it.

Q. You can't find that in the books? You are so completely ignorant of the context of your books that you can't turn to them and find out for me whether or not you credited the capital account with the 342 suits, is that correct?

Mr. Hagerty: Just a moment—just a moment. I will object to that as being argumentative, your Honor. Move to strike it.

Mr. Drewes: Your Honor, this man has testified

(Testimony of Milton H. Olender.)

that he prepared his own returns for a number of years, his mother's returns, returns for Simmons Company, for which he was paid, he has negotiated evaluations of property, he has filed an affidavit in which he said he has done much auditing over the years, he is a successful business man by his own characterization.

The Court: Will you turn to your capital account?

A. I wouldn't know where to look.

The Court: He said he wouldn't know where to look for the capital account. That is his answer.

The Court: Or the investment account.

A. There are forty pages of it.

The Court: Would you find it in your investment or capital account? This may simplify the question, at least I am not intruding on the examination, but to simplify it in my mind, in taking 322 sailor suits into your inventory, [478] would you not effect a journal entry in order to take it in your books?

A. I didn't, not to my knowledge.

Q. Ordinarily in accepted accounting practice, would you not, in order to take 322 sailor suits into your book accounts, effect it through a journal entry?

A. You might. I don't know. I don't know enough about bookkeeping to know that.

Q. (By Mr. Drewes): Let me ask you this question, if the receipt of \$5,000 is from the proceeds of the Lerman sale represented additional capital contribution to your business, as you have just testified, wouldn't the picking up of 342 sailor

(Testimony of Milton H. Olender.)

suits equally represent a capital contribution to your business?

Mr. Hagerty: Object to the question.

Q. (By Mr. Drewes): To be credited accordingly.

The Court: The objection is overruled.

A. Will you repeat that question?

Mr. Drewes: Let me put it this way.

If the \$500 received from the proceeds of the Lerman sale represents an addition of new capital—

The Court: \$5,000.

Mr. Drewes: I beg your pardon?

Q. (By Mr. Drewes): \$5,000 represents the capital contribution of new capital to your business to be credited to your [479] capital account, wouldn't the acquisition or picking up of 342 sailor suits also represent additional capital contribution to your business to be handled the same way?

A. It might. I am not enough of an accountant to know.

Q. Now as I understand your testimony, Mr. Olender, you credited the 342 suits—

A. 322.

Q. It is my understanding that you—let's be sure what we are talking about here. It is my understanding of your testimony that after the sale of the \$7000 worth of suits by Leavy and after the \$5000 sale to Lerman you picked up the rest of the suits in inventory which was 342?

A. It was 322.

(Testimony of Milton H. Olender.)

Q. And you sold 20 in the business, is that correct? A. 322 were left, 20 were sold.

Q. All right. Now we are talking about the same thing. It is my understanding that you picked up the 322 suits in your inventory as of the 1st of January, 1946, is that correct?

A. I believe so.

Q. And that was approximately a year after you acquired the suits? A. That is correct.

Q. May I ask you why you did not pick up those suits in your inventory as of the beginning of [480] 1945?

A. Most of them were sitting in my basement as I had received them and I just let them sit there waiting the ultimate outcome of Mr. Leavy's transactions, trying to return them.

Q. Your answer to my question is they were just sitting there?

A. They were just sitting there.

Q. I will ask you the question again. Why didn't you pick them up on the inventory?

A. Because it was still an unsettled item.

Q. In what respect was it an unsettled item?

A. Mr. Leavy was going to get me either new suits or the money for those suits.

Q. Why did you pick them up then in the subsequent year rather than in the first year?

A. Because all of the transactions happened then. I was in the spot where I had to put them in.

Q. Will you explain that, what do you mean by

(Testimony of Milton H. Olender.)

that, that you had to pick them up, that you were in a spot?

A. I had nothing—I had the 200 suits of Mr. Goodman—Mr. Lerman's entered in my books. I had the other transactions of Saraga, and those were left, and Mr. Leavy said, "That's all I can do for you. There's no—no more I can get rid of."

Q. Will you state again, Mr. Olender, why Mr. Leavy undertook [481] to sell these Goodman suits for you?

A. Because he had been the one who had purchased them for me and had promised me faithfully that they would be small sizes.

Q. And that proved not to be the case?

A. Correct.

Q. It is your testimony that they were primarily large sizes? A. They were all large sizes.

Q. They were all large sizes. And Mr. Leavy undertook to sell them for you at cost?

A. That's correct.

Q. Which was—your cost was what?

A. \$25.

Q. Do you have anyone in your establishment who did alterations for you? A. No, sir.

Q. Did you have anyone, any tailor on a contract basis or on the basis who would come in and do the work for you? A. No, sir.

Q. Anyone to whom you would refer your customers for that work?

A. There were several tailors in the neighbor-

(Testimony of Milton H. Olender.)

hood and the boys went to whoever they wished to go to.

Q. You recommended that they go to—— [482]

A. I told them where each one was.

Q. What are those tailors' names?

A. I don't remember the names. One was called Navy Joe, one was Mike, and then there was one around the corner, a Mr. Bernstein, I believe.

Q. Do I understand then that if a customer, say a sailor came in and tried on a suit, if it didn't fit, you would—you were unable to alter it for him?

A. That is correct; I had to send him to a tailor for the alterations.

Q. And did you include that in the purchase price of the suit?

A. Only the shortening of the pants. Sometimes they wanted a zipper put in, which ran two, three, four dollars, or they would want specific things which are not ordinary, and those things they had to pay for. Shortening of a blouse or things of that sort, you don't—you just don't fit them that way.

Q. Was it ever necessary to cut down the suit, cut down the blouse, take in the waistline?

A. Well, when I said "shorten the pants," that includes taking in the waistline. The pants had to fit. But the blouse, we don't touch at all. No work was done on the blouse that we paid for.

Q. Do I understand that the customer just took the suit [483] over his arm, in the box, and went off to a tailor? A. That's correct.

Q. And that was the end of the transaction of the suit, as far as you were concerned?

(Testimony of Milton H. Olender.)

A. After he paid for it.

Q. He paid for it and took the suit with him?

A. That's right.

Q. And your understanding with him was that if he wanted any tailoring he could just go over to the tailor?

A. Outside of those things which I allowed him the deductions for. He paid for the rest.

Q. You still operate on that basis?

A. I still operate on the same basis. There is a tailor right next door to me now and he now comes into my store and does the measuring up.

Q. How long has he done that for you?

A. He has only been there a year. This last year.

Q. What is his name?

A. He is the Mike who used to be around the corner.

Q. What is his name?

A. I don't know his last name at all. Just Mike. Mike the tailor.

Q. He just comes in your store?

A. He is right next door to me.

Q. You don't know his last name? [484]

A. No, I don't. It's an Italian name, a rather long name, that I never heard. I never heard it.

Q. What is his address?

A. 1024 Broadway.

Q. Who did the work before Mike did the work?

A. Well, the last several years it's been practically none. I just sent them around to any tailor.

(Testimony of Milton H. Olender.)

I might explain to you, Mr. Drewes, the reason I had no tailor in the store, there was a tailor in the building and they would not permit me to have one in my business.

Q. Did the tailor in the building do the alteration work for you?

A. Some of it—not for me. For anybody.

Q. It is true, is it not, Mr. Olender, that in a given assortment of sailor suits it would be more advantageous if they tended to be large than if they tended to be too small? A. No.

Q. Is it not true that you can cut down larger suits more readily, whereas it is—to fit your customers—whereas it is virtually impossible to expand a suit that is too small, isn't that true?

A. You wouldn't like to have a 44 cut down to your size, would you, Mr. Drewes?

Q. I would rather have that than try to wear a 32.

A. We didn't cut them down that way for our boys. [485]

Q. Mr. Olender, you testified that you received no invoices from Mr. Goodman?

A. Just one.

Q. I thought you testified that you received—

A. The \$1380 purchase which I made, I received an invoice. I told you that.

Q. For how much? A. \$1380.

Q. \$1380? A. Yes, sir.

Q. Was that a purchase apart from the original transaction? A. Yes.

(Testimony of Milton H. Olender.)

Q. Was that entered in your books?

A. Yes, sir.

Q. How do you know?

A. I still have the name of Mr. George Goodman.

Q. How do you know it is entered in your books?

A. Because I have seen it. It was called to my attention by the Internal Revenue Department.

Q. Having seen that, could you look at your books and find out what other purchases are entered?

A. There are no other sailor suit houses.

Q. Pardon me? I didn't understand your answer.

A. Mr. Goodman represented houses for sailor suits, and my only transactions with Mr. Goodman were for sailor suits. [486] The other houses which I bought merchandise from carried hundreds of items which I bought. I cannot tell from my books here which one of those invoices were sailor suits. But I gave to Mr. Blanchard 25 or 30 invoices of the Dorfman Hat Company which designated sailor suits on them.

Q. I am going to show you defendant's Exhibit N for identification, which is the inventory. Calling your attention particularly to item of 322 serge suits. I am going to ask you, Mr. Olender, if there is anything in that record as it stands there which enables you to identify those suits as coming from George Goodman?

A. There is.

Q. What is it?

(Testimony of Milton H. Olender.)

A. I know that they were George Goodman.

Q. I didn't ask you that.

May that be stricken as unresponsive?

The Court: That may go out.

Q. (By Mr. Drewes): Will you answer my question? I didn't ask you if you knew. I asked you if there was anything in that record as it sits before you that ties those suits into the Goodman transaction.

A. Not the name George Goodman on them.

Mr. Drewes: May that be stricken as unresponsive?

The Court: Yes, that may go out.

Mr. Drewes: Will you answer the [487] question?

A. Would you repeat the question, please?

Q. Is there anything in the record which is now before you which identifies those 322 serge suits as having come from George Goodman?

A. I don't know.

Q. Well, look at it, Mr. Olender. Examine it carefully.

A. Well, it definitely identifies it in my mind as George Goodman's suits.

Mr. Drewes: May that be stricken as unresponsive?

The Court: That may go out.

Q. (By Mr. Drewes): Examine that record, Mr. Olender, in front of you. Is it not——

Mr. Hagerty: If your Honor please, I will object on the ground the record speaks for itself.

(Testimony of Milton H. Olender.)

The Court: Overruled.

Mr. Hagerty: This man's conclusion from the record is immaterial.

The Court: Overruled.

Q. (By Mr. Drewes): Now the record is in front of you. Will you look at it, Mr. Olender, and will you tell me if anything appears in that record which identifies those suits as having come from George Goodman?

A. There is no name on them.

Mr. Drewes: May that answer go out?

The Court: Yes, that may go out. [488]

Q. (By Mr. Drewes): Will you answer my question?

A. Well, I don't understand what you are driving at.

Q. I want to know if there is anything in that record which identifies those suits as coming from George Goodman?

A. There is nothing in this record that identifies anything as coming from anybody.

Mr. Drewes: That will do. May we take the morning recess, your Honor?

The Court: Take the morning recess, ladies and gentlemen. The same admonition to you.

(Short recess taken.)

Q. (By Mr. Drewes): Mr. Olender, did you buy anything else from Mr. Goodman in 1944 other than sailor suits? A. No, sir.

Q. And it is your testimony that you received no invoices from Goodman other than one?

(Testimony of Milton H. Olender.)

A. That's correct.

Q. And that invoice was the \$13,000?

A. \$1380.

Q. How do you know your price was \$25 if you have no invoices, Mr. Olender?

A. I received suits on the basis of that price. By the number of suits I received and the price. You just multiply the number of suits or divide the number, the price, by \$25, and it comes out the number of suits that I received. [489] I kept track of the suits that I received at the time.

Q. Is the price \$25 with respect to that \$13,800? A. \$1380.

Q. Yes.

A. No, I believe the price was lower on those.

Q. What was the price on those?

A. I don't remember. If you will bring the invoice I could tell you. I don't remember it.

Q. Mr. Olender, the only invoice you ever received was that invoice covering the \$13,800 shipment? A. \$1380.

Q. \$1380. Do you remember approximately when that purchase was made?

A. No, I don't. Shortly after this other one.

Q. Mr. Olender, I show you two photostatic copies of documents, one dated June 8th, one dated June 14th, 1944. They appear to be addressed to you, from George Goodman Sales Agency. And I ask you to examine those? A. Yes.

Q. Have you examined them? A. Yes.

Q. Having examined those documents, do they

(Testimony of Milton H. Olender.)

refresh your recollection as to having received the originals thereof? A. No, sir.

Q. You remember ever receiving them [490] before?

A. I never have seen them before.

Q. Mr. Olender, as to the suits which you purchased from Goodman, to which you have testified, were any of them paid for by you at the price of \$23?

A. I don't know what that \$1380 invoice was for.

Q. You don't recall? A. I don't recall.

Q. Could the price have been \$23?

A. I don't know. It's on the invoice, if you have the invoice.

Q. I haven't the invoice, Mr. Olender.

A. The Government had it. I gave it to them.

Mr. Drewes: Do you have the invoice?

(Thereupon discussion between counsel out of the hearing of the reporter.)

The Witness: May I see those two photostats again (referring to photostats of Goodman invoices)?

Mr. Drewes: Of course, (handing to witness).

Q. Having examined them again, is your recollection refreshed? A. No, sir.

Q. You don't recall ever receiving the original of these invoices?

A. I never received them, no, sir.

Q. Mr. Olender, you stated in the course of your

(Testimony of Milton H. Olender.)

testimony [491] yesterday in response to a question put to you by the Court that your books of account would reflect the sale of 20 of the Goodman suits. A. I don't—

Q. Are you prepared to demonstrate where those sales appear in your books?

A. There would be no way to show that. My daily sales appear on my register and at the end of the day, if the suit were sold for \$35, that sale would be deposited with my regular sales. It would not say that it was a specific sale. All of my sales are on my register tapes and they would be deposited from there into the bank, and twenty of those suits went into my store register.

Q. Mr. Olender, at page 401 of the transcript of yesterday's testimony, beginning at line 9, Mr. Hagerty asked you this question:

“Q. Those were sales at retail in your store?”—with reference to the 20 suits—

“Q. Those were sales at retail in your store? The answer:

“A. Retail, yes. They were sold at retail.

“The Court: Those sales would show on your books?

“A. They will show in my daily sales.

“The Court: They would be reflected in your books of account here? [492]

“A. Yes.”

Now are you changing your testimony?

A. No, I am not changing it. It is just the same thing. I don't put specific items—I have no bills or receipts made out for each sale or any-

(Testimony of Milton H. Olender.)

thing. It is just rung up in the register and at the end of the day your sales total so much and they are definitely in the sales. They were not kept—

Q. I understand your testimony to be that your books do not reflect the sales of those 20 suits as such, is that correct?

A. Not—it doesn't show them specifically, but they are in there.

Q. You can't point to them? A. No.

Q. Mr. Olender, you testified on your direct examination that you were made trustee of the Olender Building, is that your testimony?

A. Yes.

Q. Was any public record made of your trusteeship, to your knowledge? A. Yes, sir.

Q. Where was that recorded?

A. In the County of Fresno.

Q. Pardon me?

A. The County of Fresno.

Q. The County Recorder's office? [493]

A. Yes.

Q. And you testified that your uncle and your brother— A. Father.

Q. Pardon me. Your father and his brother gave you one of their two stores in Fresno which they operated before as a partnership, that you gave it back to them subsequently?

A. Yes, sir.

Q. State if you recall whether any public record was made of either of those transactions?

A. There was not.

(Testimony of Milton H. Olender.)

Q. Your father and your uncle were partners in the business which they then gave to you?

A. Yes.

Q. What was your uncle's name?

A. Samuel Olender.

Q. Does he have any children?

A. He has two children.

Q. Did he have children at that time?

A. Yes.

Q. I am going to hand you now, Mr. Olender, what purports to be a transcript of your record at the University of California. I am going to ask you to examine it for the purpose of refreshing your recollection. Will you look particularly at the subjects listed under the fourth year?

Mr. Hagerty: We have no objection, Mr. Drewes, if you [494] wish to put that in evidence.

Mr. Drewes: No, thank you.

Q. Have you examined it? A. Yes, sir.

Q. Will you state, having refreshed your recollection, will you state whether or not you took in your senior year, your fourth year, a course, "Economics 162, auditing"? A. I did.

Q. Did you take in your second year a course "Principles of accounting"? A. I did.

Mr. Drewes: No further questions.

No. 13658

**United States
Court of Appeals**
For the Ninth Circuit.

MILTON H. OLENDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

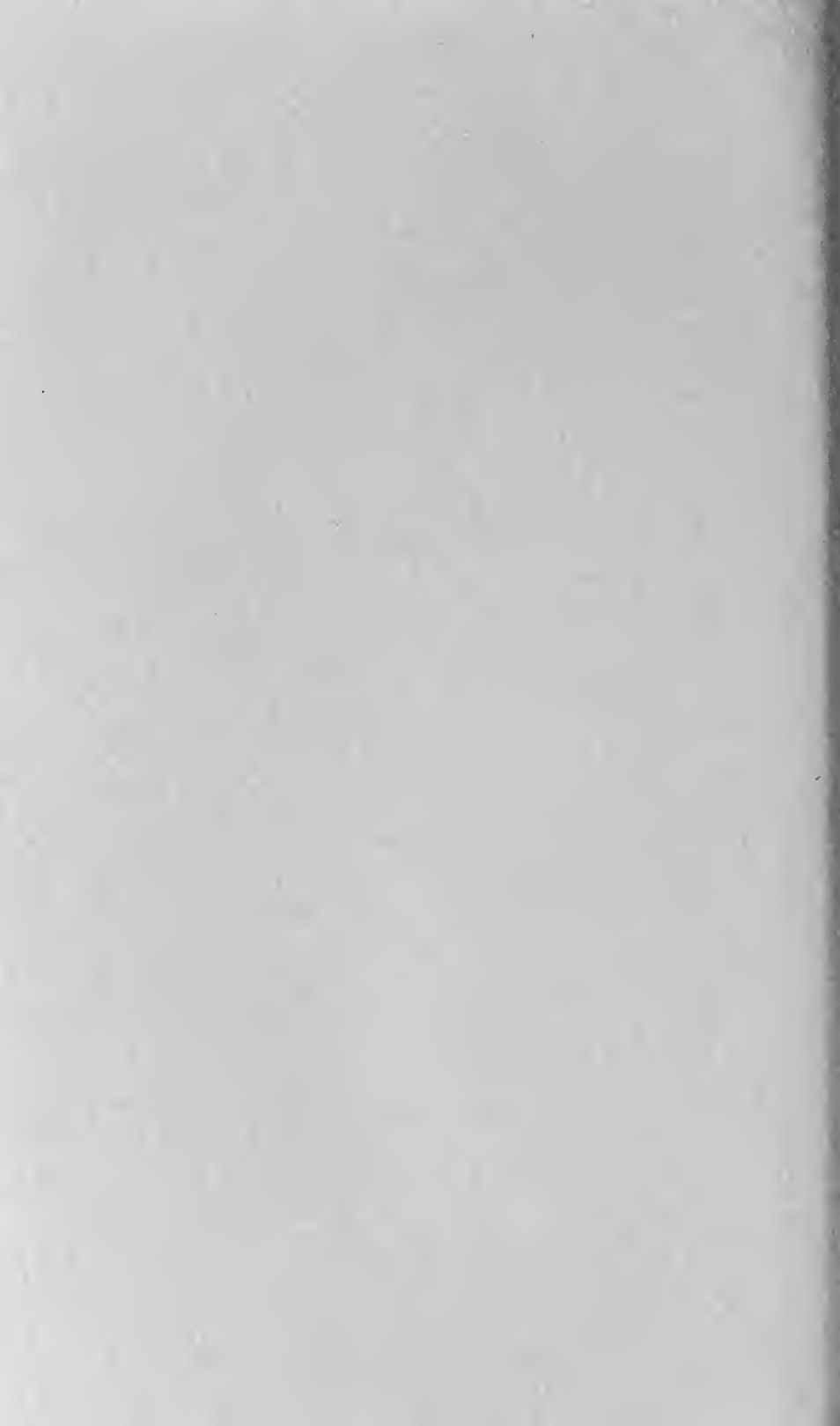
Appellee.

Transcript of Record
In Three Volumes
Volume II
(Pages 497 to 936)

**Appeal from the United States District Court for the
Northern District of California;
Southern Division.**

MAY 14 1953

PAUL F. O'BRIEN



No. 13658

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MILTON H. OLENDER,

Appellant,

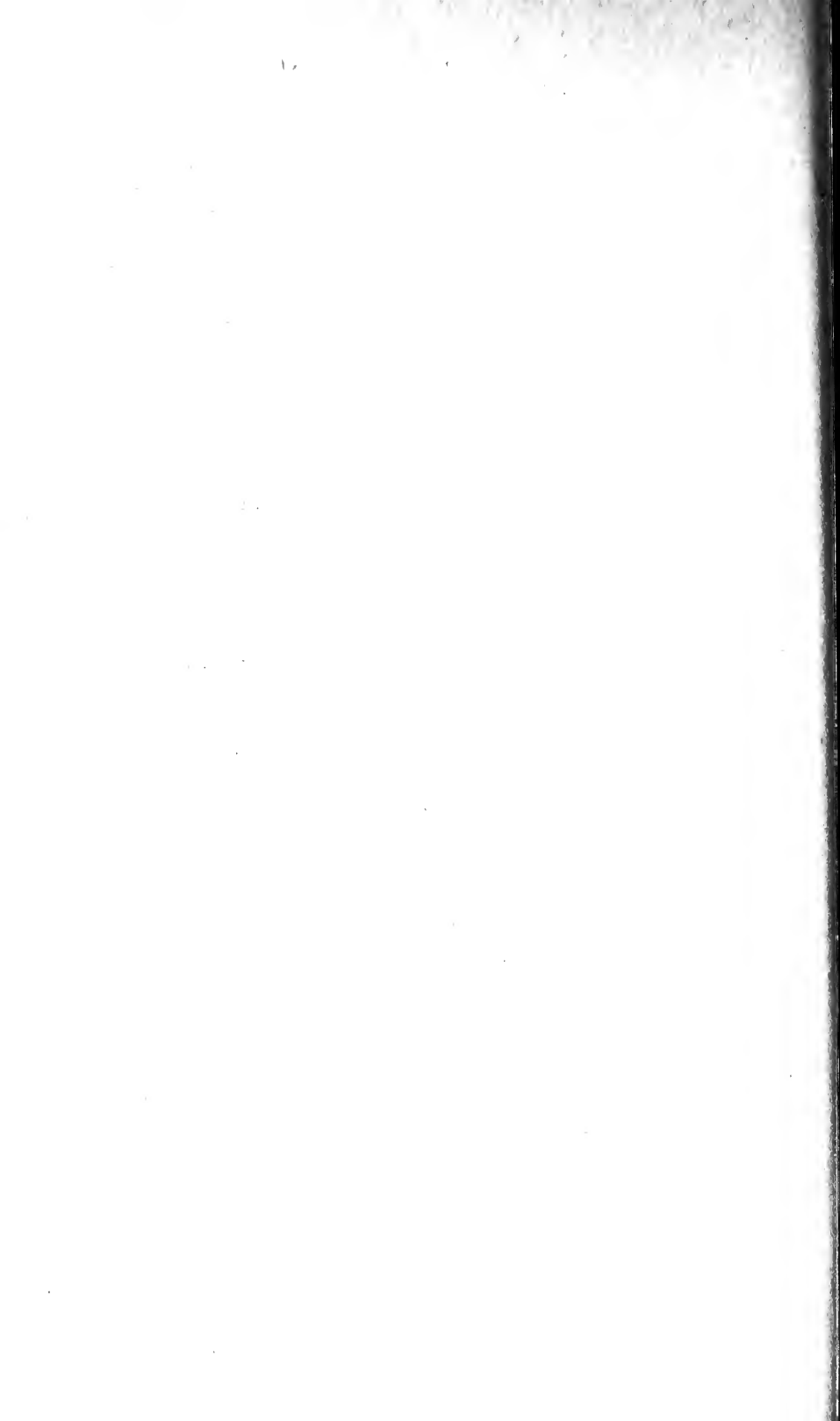
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Transcript of Record
In Three Volumes
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Appeal from the United States District Court for the
Northern District of California,
Southern Division.



(Testimony of Milton H. Olender.)

Redirect Examination

By Mr. Hagerty:

Q. Mr. Olender, in connection with the last two questions of Mr. Drewes', you took accounting at the University of California, how many years ago was that? A. It will be 35 pretty soon.

Q. How big a class were you?

A. 1918 class.

Q. How big a class? How many pupils in the class that you studied accounting in, do you recall?

A. Twenty-five or thirty.

Q. What other subjects did you study at that time?

A. Well, accounting was a very minor subject. I took general economics course, money and banking, commerce, and [495] social history of England, railroading, statistics, oh, several others. I was taking a course to prepare me to go into my father's business.

Q. I notice there is a course indicated here, "First year P.E." What is that?

A. Physical Education.

Q. And another one "Geography," is that right?

A. Yes, geography.

Q. "Economics 4," "Economics 3-A," what were they, do you know? A. I don't remember.

Q. Another course, "German." Can you speak German? A. Yes, very fluently.

Q. Could you speak it before you went to school?

A. Yes, in my home. In fact, I majored in German more than economics.

(Testimony of Milton H. Olender.)

Q. Were the accounting courses that you took in your courses at college considered electives to your major?

A. They were requirements of a college of commerce. You had to take them.

Q. Awhile ago Mr. Drewes questioned you in reference to your inventory sheet.

A. Yes, sir.

Q. Were these inventory sheets made in the regular course of your business? For the purposes of the record, defendant's [496] Exhibit N for identification.

A. They were made in the regular course.

Q. They were made in the regular course of your business? A. Yes.

Q. Made at your immediate direction, were they?

A. They were made solely by me.

Mr. Hagerty: At this time, your Honor, I would like to offer in evidence the inventory sheets of the defendant, which is defendant's Exhibit N for identification.

The Court: Is there any objection?

Mr. Drewes: No objection.

The Court: These are in the handwriting of one person, are they?

A. They are in my handwriting.

The Court: They are in your handwriting?

A. Yes.

The Court: In association with the inventory schedules which counsel has offered to be introduced in evidence, did you maintain or cause to be maintained a stock ledger account?

(Testimony of Milton H. Olender.)

A. No, sir. Just one inventory a year. I took one at the end of each year.

The Court: With reference to the years in question and under inquiry did you at any time maintain a stock ledger account? [497]

A. What do you mean by stock ledger account?

Q. Well, what is your appraisal of a stock ledger account? A. I don't know what it is.

Q. Did you ever hear of a stock ledger account?

A. No, sir.

Q. How many different types of merchandise did you handle? A. Several thousand.

Q. How did you know from time to time the amount and the identity of any particular commodity as contained in your place of business?

A. I kept very close touch on every item.

Q. How?

A. I knew what was selling and I knew what was getting low.

Q. How? A. I could tell.

Q. How?

A. If someone came in and I was out of something I knew it.

Q. How?

A. Because I couldn't sell it to them. If a man wanted an item and I was out of it, I immediately replenished it, and I did have this additional help, my main business, as has been stated before, was with service men, and there were several definite items which were demanded constantly and I [498] never permitted those items to run low, items that I carried as many as five and ten gross of, and the

(Testimony of Milton H. Olender.)

moment we got down to one or two gross I immediately had those clerks come to me. I could not let them run down because they were very profitable items and constantly saleable.

Q. Well, you had clerical help, did you not?

A. Yes, I did.

Q. Bookkeeper?

A. A very short part-time bookkeeper.

Q. And other than that you maintained the books yourself? A. No, I did not at any time.

Q. Who maintained the books?

A. Miss—Mrs. Vera Manger. I might add, your Honor, I had two bookkeepers, Mrs. Manger left my employ during 1945 and Mrs. Virginia Busby came in.

The Court: Let us take the earlier years when you would be entrained in the business, do you recall at any time a stock ledger account in connection with the business?

A. No, sir, never had one.

Q. You never maintained a stock ledger?

A. No, sir. I had a one man business. I had all I could do to run it myself. I had no employees whatsoever until 1941.

Q. And the question I addressed to you yesterday with respect to the 20 sailor suits, are the records available [499] either in Court or elsewhere wherein a determination could be made as to the sales of those sailor suits?

A. The only thing that I would have, your Honor, I have my deposit books, the daily deposit book. When I make a deposit to the bank I record

(Testimony of Milton H. Olender.)

all checks and currency and so on, and the sales are there but there would be no way——

The Court: Haven't you an invoice register?

A. No.

Q. Did you ever maintain an invoice register?

A. What do you mean by invoice register?

Q. Incoming items or outgoing items?

A. Yes, there is one here.

Q. Did you keep an account of the sailor suits?

A. Not separately, not—. I only kept the accounts of the people from whom I bought the merchandise. Not the items. In other words, I am buying from a house now, Wolfe, Brown & Company. I buy sailor hats, military equipment, sailor uniforms. I don't differentiate.

Q. Was this inventory that you now propose to have introduced in evidence made by actual count?

A. Yes.

Q. And the inventory in question has no relationship or bearing to any of the books of account?

A. No. I just went downstairs first. I have two basements. And I took the basements separately. Then I came upstairs and [500] took them and recorded them in my inventory. And the total inventory shown there is the inventory which is reflected in my return.

The Court: Well, let us take the invoices coming from Goodman & Company or Saraga or any of the other persons to whom reference has been made.

Did you keep those invoices in any place in your business? A. Yes, I did.

(Testimony of Milton H. Olender.)

Q. And as you paid the invoice I assume you made an entry in your book? A. Yes.

Q. Let us take the Goodman transaction. You paid the Goodman transaction. How would you enter it in your books? A. Which one?

Q. Take the Goodman transaction involving \$20,000.

A. It was never entered, the original transaction. Only the later items which came in and were put in the books.

Q. The only other item you had of the Goodman transaction was in connection with the 322 sailor suits, is that right?

A. And the deposits of the sale Mr. Leavy had made and Mr.—and the one to Mr. Lerman.

Q. Is there anything in these books here that points to an inventory account at all?

A. Just at the end of the year there is a [501] merchandise record which would show the inventory, the amount of inventory.

The Court: May I see that, please?

A. (Handing to Court.)

The Court: Let us take the inventories here. May I have them, Mr. Clerk?

(Inaudible remarks of witness.)

The Clerk: Speak up, Mr. Witness.

The Witness: I am sorry. I thought I was talking to the Judge.

The Court: What does J. G. 22 mean?

A. General journal page 22. This is the profit and loss statement.

(Testimony of Milton H. Olender.)

Q. Is this in your handwriting?

A. No, sir.

Q. You have an item of \$85,001.26. You credited inventory and you debited profit and loss, is that right?

A. I assume so. I don't know.

Q. You mean to say that you do not know what Dr. and Cr. means?

A. Oh, yes. I didn't know which account you meant. I don't know why it's profit and loss. I don't understand that.

The Court: I have no further questions. These may be admitted in evidence.

The Clerk: Defendant's Exhibit N heretofore marked for [502] identification now in evidence.

(Thereupon group of inventory sheets previously marked Defendant's Exhibit N for identification were received in evidence.)

Q. (By Mr. Hagerty): Directing your attention——

The Court: Oh, by the way, for insurance purposes how did you carry your insurance in connection with your stock and inventory stock?

A. Based on my inventory.

Q. Based on inventory? A. Yes.

Q. How often would you advise the insurance company of the inventory status?

A. Well, I had only one insurance man and he kept in constant touch with me and if I had bigger purchases or my inventory seemed to be up some time during the middle of the year I would increase it.

(Testimony of Milton H. Olender.)

The Court: Well, your appraisal as to inventory, would that be reflected in your books of account as to current inventory, would that be reflected in your books of account?

A. No, not the current.

Q. Do I understand your testimony that at no place in your books of account could anyone find a current inventory?

A. Not a current one. Only the one at the first of the [503] year.

The Court: All right. That may be marked in evidence.

Q. (By Mr. Hagerty): Mr. Olender, did you know George Goodman?

A. I never met the man in my life until 1947 when he came out here.

Q. Did you ever know Mr. Saraga?

A. I never saw Mr. Saraga till last week.

Q. That was here in this trial? A. Yes.

Q. Had you ever done business with either of those gentlemen prior to, say the first of 1944?

A. No.

Q. How did you first start to do business with them? A. Through Mr. Leavy.

Q. Will you find in the defendant's Exhibit N that reference to the 322 sailor suits at the end of the Goodman transaction when you put them into inventory? A. The end of '46?

Mr. Hagerty: What is the page number?

Mr. Lewis: Page 45, January 1, 1946.

A. Yes, I found it.

Q. (By Mr. Hagerty): At the top of that sheet,

(Testimony of Milton H. Olender.)

page 45 of the 1946 inventory, is there any memorandum as to the location in your store of that [504] material? A. There is a notation "B-1."

Q. What does that mean?

A. Basement No. 1.

Q. When you received the Goodman uniforms, which didn't suit your business, they were over-size or unmerchandisable, where did you place them?

A. In basement No. 1.

Q. And they remained there all the time?

A. They did.

Q. Until you took them into this inventory?

A. That's correct. They were in there during this inventory.

Q. Was that fact always predominant in your mind in reference to these suits?

A. I knew they were always in the basement, because there was no use bringing them upstairs. Just but a handful of them.

Q. In your inventories do you show the source of any of the individual items?

A. I do not.

Q. In reference to these 322 suits on sheet 45 of the 1946 inventory are there some pencilled memoranda on that sheet? A. There are.

Q. And what does that indicate to you?

A. It indicates at the end of that all of the merchandise [505] which is in basement No. 2.

Q. But I mean with particular reference to the suits, was there——

A. It indicates of the 322 suits which were all

(Testimony of Milton H. Olender.)

Goodman suits in my basement, 75 of them were upstairs and the remainder were downstairs, but I wanted to get a correct count on those Goodman suits.

Q. Yesterday Mr. Drewes questioned you with reference to the preparation of income tax returns for other people, among them relatives of yours that operate the Simmons Glove concern, is that it?

A. Yes.

Q. In the preparation of those returns did you make any audit of their books?

A. I did not. I never saw their books.

Q. How did you prepare the return?

A. Mrs. Simmons and her assistant kept the books, and it is a very simple matter to make up an income tax return from a business if you have certain definite items. You just have an inventory at the beginning and an inventory at the end, your purchases and your sales, and then your expenses, and I told her to make out a sheet for me and if she would give me those figures I would show her how to make out the return and help her with it. And that's what I did for her.

Q. In other words, she prepared the figures, brought them [506] to you—

A. That's right.

Q. —and you assembled them on the income tax form? A. That's right.

Q. She paid you something for that, too, did she not?

A. Against my will she paid me \$25.

(Testimony of Milton H. Olender.)

Q. And what did you do with the funds?

A. I cashed the check, and she is a very active social worker, and I told her that I was going to give that to her, I didn't want it, and to turn it over, and it was either turned over to the Haddasah, Youth Allyah, or some other Jewish charity in which she was working at the time. I don't know which one, and they got the money for it.

Q. You yourself kept no part of the funds?

A. No part at all.

Q. Mr. Olender, directing your attention to an affidavit that Mr. Drewes questioned you about yesterday, which apparently is an affidavit of your own. Will you relate the circumstances to His Honor and the ladies and gentlemen of the Jury as to how that affidavit was prepared?

A. How or why, Mr. Hagerty?

Q. Both.

A. Well, it was prepared for a specific purpose. My sister, as has been stated in Court here, was the attorney for the estate, and she knew as a [507] fact——

Q. That is, the estate of your father?

A. The estate of my father. And she knew as a fact——

Mr. Drewes: We object what the sister knew as a fact. It is no part of this record. It is hearsay as to this witness.

Mr. Hagerty: I will withdraw that.

Q. What is your birth date?

A. December 6, 1895.

(Testimony of Milton H. Olender.)

Q. Is there a recital in that affidavit as to your date of birth? A. There is.

Q. Will you read it?

A. (Reading):

“Milton Howard Olender, being duly sworn, deposes and says, that he was born on December 5, 1895.”

Q. And you were born on December 6th, is that right? A. Correct.

Q. Did you read that affidavit when you signed it? A. I did not.

Q. Who prepared it, who prepared the affidavit, who drew it up?

A. My sister who was the attorney for my father's estate.

Q. How did you happen to sign it?

A. Well, I had a good deal of faith in my sister. I knew [508] what she was trying to accomplish and I knew that the facts that she was stating in there as to the purpose of the affidavit were correct, because she had told me what she was going to try to prove.

Q. Mr. Olender, I show you a couple of letters apparently, which are written in lead pencil. Do you recognize them? A. I do.

Q. What are they?

A. Letters from my mother.

The Court: We might take the noon adjournment at this time, ladies and gentlemen. The same admonition to you, not to discuss the case under

(Testimony of Milton H. Olender.)

any condition or circumstances, not to form an opinion until the matter is submitted to you.

And we will resume at 2:15.

Mr. Drewes: If your Honor please, may I make a statement at this time for the record, may I ask counsel for the defendant and his accountant to search the records of the defendant for the purpose of finding what invoices appear in those records of Mr. Goodman with particular reference to any dated June 8 or June 14, 1944.

Mr. Hagerty: We will be glad to do it, your Honor, if we can find them.

Mr. Drewes: Thank you.

(Thereupon an adjournment was taken until 2:15 o'clock p.m.) [509]

September 24, 1952, 2:00 P. M.

MILTON H. OLENDER

the defendant herein, having been previously duly sworn, resumed and testified further as follows:

Redirect Examination

(Resumed)

By Mr. Hagerty:

Q. Mr. Olender, you testified here that in reference to the Asturias Import Export Corporation that you had first given them \$5000 as an investment, or whatever it was, that you then gave them another \$5,000 at a later date as a loan, is that true? A. That is correct.

(Testimony of Milton H. Olender.)

Mr. Drewes: Objected to, your Honor, as improper redirect. I didn't cover the matter on cross-examination.

The Court: Overruled.

A. That's correct.

Q. (By Mr. Hagerty): Subsequently, maybe a year or so later, was it, you received stock in that corporation? A. I received the stock in 1948.

Q. 1948. At this time I show you a promissory note and ask you if you can identify it.

A. That is a note signed by the vice-president of the company.

Q. Of which company?

A. The Asturias Export and Import [510] Company.

Q. And how did that originate, that note?

A. That is a note in which they gave me for a \$5,000 which I had loaned them.

Mr. Hagerty: At this time, your Honor, please, I would like to offer this note in evidence as the defendant's next in order.

Mr. Drewes: May I see it, counsel?

Mr. Hagerty: Didn't I show it to you?

Mr. Drewes: No.

The Court: Is there any objection?

Mr. Drewes: I haven't seen it, your Honor.

Mr. Hagerty: I'm sorry. I laid it on his desk and I thought I showed it to him.

The Court: It would facilitate matters if you exchanged these exhibits.

Mr. Hagerty: Yes. I laid it on his desk before

(Testimony of Milton H. Olender.)

Court started together with this invoice that he requested.

Mr. Drewes: No objection.

The Court: It may be marked into evidence.

The Clerk: Defendant's Exhibit R in evidence.

(Thereupon promissory note in the amount of \$5,000 was received in evidence and marked Defendant's Exhibit R.)

Mr. Hagerty: At this time, if I may, your Honor, I would like to read the note to the jury and show it to them.

The Court: Certainly. [511]

Mr. Hagerty: Defendant's Exhibit R reads as follows: It is in the form of a promissory note. Herein he gives \$5000, dated December 12, 1946.

"Within ninety days after date we promise to pay to the order of Milton Olender \$5000 at 112 Market Street, San Francisco, California, value received with interest at per cent per annum."

This is No. 5. There is a blank space, and the maker of the note, the Asturias Import Export Corporation, by Benjamin H. Neiden, general manager, and it is signed in ink Benjamin H. Neiden, vice-president.

Mr. Hagerty: At this time may I pass it to the jury?

(Exhibit R passed to the Jury.)

Q. (By Mr. Hagerty): Mr. Olender, at the time of the execution of this promissory note, which is defendant's Exhibit R in evidence, was that in-

(Testimony of Milton H. Olender.)

tended to be for the purchase of securities in this corporation? A. It was not.

Q. Subsequently did you receive securities from that corporation?

A. Yes, subsequently, in 1948.

Q. Can you explain to the ladies and gentlemen of the jury and His Honor why you got the securities instead of the money back on this note?

A. Well, all the money that we had loaned them was gone. [512] They had nothing to show for it, so they decided to give us securities for it instead of nothing.

Q. At this time, Mr. Olender, I show you an invoice and ask you if you can recognize it?

A. Yes, sir.

Q. What is it?

A. It is an invoice from George Goodman Sales Agency dated September 12, 1944.

Q. What does that represent or cover?

A. 60 serge sailor suits for \$23 a suit, \$1380.

Mr. Hagerty: At this time, if your Honor please, I would like to offer this invoice as the defendant's exhibit next in order.

Mr. Drewes: No objection.

The Court: It may be marked in evidence.

The Clerk: Defendant's Exhibit S in evidence.

(Thereupon invoice in the amount of \$1380 was received in evidence and marked Defendant's Exhibit S.)

Q. (By Mr. Hagerty): Mr. Olender, on Exhibit

(Testimony of Milton H. Olender.)

S, defendant's Exhibit S, the price of 18 ounce serge sailor suits—the cost price is shown as \$23, is that true? A. Yes, sir.

Q. On this large order that you placed with Mr. Goodman the cost price was \$25, you testified?

A. That's correct. [513]

Q. Can you explain the difference?

A. Yes. The actual cost of the suits, as far as they were concerned, is \$23, but there was a \$2 commission. One dollar went to Mr. Leavy, one dollar went to Mr. Goodman, and the price to me for the suits was \$25. I didn't know how they divided it up but I learned that later that each one got a dollar for each suit.

Q. Now with reference to the lot of suits, 322 suits that you had on your inventory, indicated as being in basement 1, did you keep any other sailor uniforms in that basement?

A. I kept none but the Goodman suits.

Q. Then is it your testimony that at all times you kept the Goodman purchases, that is original purchases, the purchase of sailor suits which was unmerchandisable from your standpoint, you kept it segregated in your store?

A. They were in the basement, basement No. 1, separate, segregated.

Q. With the exception of the 75 you indicated you had upstairs?

A. There were a few suits I had upstairs. I brought the smaller sizes. I call them "smaller," they were 38's which you could sell occasionally.

(Testimony of Milton H. Olender.)

Q. Now following this year of 1944 or during the period '44, '45 and '46, did you attempt to make any large purchases of uniforms other than from Mr. Goodman? [514] A. Yes, I did.

Q. Can you tell the ladies and gentlemen of the Jury where and when you tried to make such purchases?

A. The exact dates I don't remember. But there was a check issued on the Army and Navy Store in 1945 for \$55,000 to one Joseph—S—a—b—e—in New York and that deal did not materialize. My check was returned to me and redeposited.

Q. Is that transaction reflected in your records?

A. It is in the books of the Army Navy Store for the year 1945. Also just prior to this Saraga Seagoing deal, which shows on my books as, I believe, \$27,000 plus, I issued a check to the Seagoing Uniform Company of New York for \$27,000, and a short time thereafter, due to the inability of the Seagoing to deliver it, they returned that check to me, and it likewise was entered into the books of the Army and Navy Store, and they are on my records there.

Q. Why were you attempting to make such large purchases of sailor uniforms?

A. Well, they were very difficult to get, especially in the sizes that you wanted, and in these two particular instances these people thought they could deliver those, and when they found they couldn't, I wouldn't accept anything else, and it was a strict

(Testimony of Milton H. Olender.)

injunction if they were not small sizes I don't want them.

Q. Directing your attention to approximately the year 1939-40, [515] what would you say your gross sales were at your location over there?

Mr. Drewes: Objected to as immaterial, irrelevant, your Honor.

Mr. Hagerty: The idea is, your Honor, to show the development, how it expanded and how it was difficult to get merchandise.

Mr. Drewes: I don't see the materiality.

Mr. Hagerty: Also to show that he was handling the whole thing himself, he was undermanned, and just to show the general duties he was doing to show why in some instances he can't remember dates, just to show the volume of work he was doing.

The Court: You may answer.

A. My sales to 1940 at no year were \$10,000. It did not reach that figure. My income tax returns will show that.

Q. (By Mr. Hagerty): Now, approximately what would your sales volume be for the years '44, '45 and '46?

A. Better than \$200,000 a year.

The Court: Are those figures heretofore the subject of any stipulation on total sales?

Mr. Hagerty: I don't think so.

Mr. Drewes: Just on assets, your Honor. Not on volume of business.

The Court: All right. [516]

Q. (By Mr. Hagerty): Now, were you han-

(Testimony of Milton H. Olender.)

dling your own purchases? A. Yes.

Q. Were you working in the store?

A. Yes, sir.

Q. Were you handling whatever credit transactions you had to make?

A. Well, if I may be permitted, your Honor, to give in detail my duties.

The Court: All right.

A. I was the sole owner and proprietor. As I have stated earlier, I only had two or three employees. My volume was up to better than \$200,000. One year I know it was \$225,000. I had to do all of the purchasing, I had to do all of the receiving of the merchandise, I had to do all of the marking, and, as you know, we were under OPA in those days, with the strict injunction that every piece of merchandise had to be marked with an OPA ceiling price on it, which I abided by.

I had to take care of the cash deposits, and while I had nothing to do with the books, I had to keep the invoices and see that they were in order so that the young lady who did the entering had them, and, I might add, that my store was open seven days a week, every day of the year, with two exceptions, Jewish holidays; that I opened at 8 o'clock in the [517] morning, I closed at ten o'clock at night without any rest, no vacations, except for a couple of brief visits to my son who was in the service; and then at the end of 1945 my health broke completely down.

(Testimony of Milton H. Olender.)

Q. (By Mr. Hagerty): Were you under the care of any physician?

A. I was under the care of S. P. Hirsch in Oakland. He put me to bed.

Q. You have testified here earlier that you prepared and assisted in the preparation of income tax returns for various people? A. Yes, sir.

Q. Where did you learn to prepare returns?

A. Well, I didn't know too much about them. In all the returns that I ever prepared I was always assisted by an Internal Revenue agent in the service of the United States Government from my earliest days in Fresno right through to the present time.

Q. Can you name some of those men?

A. In Fresno there was Mr. Shea, who has since passed away; Mr. Mitch, who was with the Government for many years and is now a certified public accountant in one of the buildings there; Mr. Hills, Larry Hills, who was a revenue agent, also connected with or is now a certified public accountant; a Mr. Harris, whom I don't know—I don't know what has become [518] of him—. In Oakland, when I came up there, Mr. Vince Guerra, who is still with the Internal Revenue Department, I believe; Mr. Ray O. Waring, who left the Revenue Agent's office and become city treasurer of the city of Oakland; Mr. Manter, who was a very high official in the Internal Revenue Department in San Francisco and later went over to Oakland and had charge of the Oakland office; Mr. Citron, revenue agent in the Oakland office, who I don't know what has become

(Testimony of Milton H. Olender.)

of him. There were several others whose names I don't remember.

Q. Well, did any of those men give you a course in the preparation of income tax returns?

A. No. Oh, no. No, I just took the returns to them and usually there were problems which came up and I wanted to be sure that they were shown directly. I didn't know how to handle them. I knew that the agents did, that they had handled many of those things, and they advised me as to just the method of handling certain things so that there would be no come-back on them because of errors in handling the thing.

Q. On cross-examination Mr. Drewes asked you about some transactions in the reporting of the income of the Riverdale Ranch.

A. That is correct.

Q. Can you tell us about the original purchase of the ranch?

A. The ranch was purchased by my father and uncle a good many [519] years, oh, I would say 1916, I believe, somewhere along in there, and they held that ranch and leased it out for many years, and it is my best recollection there was a pump put in that cost \$4500, there were several houses, a home, a barn, and quite a number of other things which the depreciation had practically vanished long before I got the property. Somewhere along in 1938 or '9—I might add the original cost of that property, I think, was \$30,000. I am not sure.

(Testimony of Milton H. Olender.)

Q. Do you have any records here that would refresh your memory?

A. Yes, I have the income tax returns. I believe you have them—of 1938 and '39.

Q. Mr. Olender, I show you a group of returns and ask you if by examining them you can refresh your memory in reference to the Riverdale transaction?

A. Well, I know the returns but I don't find all of them in here yet. (Examining documents.) Yes, I do recognize them.

Q. What was the original purchase price of the ranch?

Mr. Drewes: Object to that, your Honor, as being irrelevant and immaterial. The cost basis as to this taxpayer of his interest in that property is the valuation at the date of death of his father.

The Court: Is there a question of depreciation that [520] enters into it?

Mr. Hagerty: Yes, there is a question of depreciation.

The Court: I will allow it.

A. The original cost of that property is \$30,000. It was sold in 1938—. The year of purchase, incidentally, I see is 1914. It was sold in 1938 for \$20,000 with a loss on it. The party that purchased that property the following year gave it up, didn't want it.

Mr. Drewes: If your Honor please, may I renew the objection? I think there might be a slight misunderstanding here. The depreciation, of course, is

(Testimony of Milton H. Olender.)

in issue and is pertinent but his depreciation taken by the partnership of which the witness was a member after he acquired the property is. The cost basis of depreciation taken by his father and his uncle is immaterial.

The Court: The Government has raised the issue in connection with the depreciation.

Mr. Drewes: As to after this man acquired the property, yes.

The Court: All right.

Mr. Drewes: He is testifying as to its cost and depreciation taken by his father and his uncle long before he got it.

The Court: Let's start with the events when this man came into possession and acquired title. [521]

Q. (By Mr. Hagerty): When did you acquire title to this property or an interest in it, Mr. Olender?

A. In 1942, at the close of the estate of my father.

Q. In 1942? A. Yes.

Q. Did you take any depreciation in your income tax returns for that partnership on the Riverdale property?

A. I had forgotten that there was a \$72.50 a year depreciation, one-sixth of which would have been about \$12 for me.

Q. You were also questioned by Mr. Drewes in reference to your return on your father's estate wherein one-half the appraised value of the ranch or property was fixed at \$3,000, is that right?

(Testimony of Milton H. Olender.)

A. No, I believe \$9,000. Wasn't it, Mr. Drewes?

Mr. Drewes: The record speaks for itself.

Mr. Hagerty: Where is the record?

Mr. Drewes: \$3,950, as I recall. You will find it in the return. You will find it in Exhibit Number 47.

Mr. Hagerty: If there is a pending question I will withdraw it and direct this one.

Q. Directing your attention, Mr. Olender, to Government Exhibit number 46, schedule A attached thereto, item number 3 on said schedule. There is an appraisal indicated there of \$3,900 odd dollars on the Riverdale Ranch [522] representing an appraisal of one-half interest in that ranch.

A. That is correct.

Q. Can you explain to us why the one-half of the ranch was appraised?

A. The other half belonged to people who were not interested in the estate.

Q. And who were they?

A. My two cousins who had inherited from their father when he died in the early thirties.

Q. In other words, originally this ranch had belonged to both your father and your uncle?

A. Yes.

Q. Did you negotiate with the appraisers, the federal appraisers, or the state appraisers in arriving at that figure? A. I believe I did.

Q. And for such work was that the reason you got the fees that were shown? A. Yes.

Q. In setting up the value of this property for

(Testimony of Milton H. Olender.)

income tax purposes what basis do—did you use on this sale of setting up your values?

A. May I explain this, your Honor?

The Court: Certainly. [523]

A. Well, as I stated earlier, the property had been sold in 38——

Mr. Drewes: Objected to as immaterial, irrelevant, your Honor.

The Court: Well, it may be the basis of an explanation. I do not know at the present time.

A. It is, your Honor.

The Court: As to your compilation of evaluation?

A. Yes.

The Court: And so forth. If it is, you may answer.

A. It was sold in 38, as I stated, for \$30,000, and a loss was taken, although a five or six thousand dollar deposit had been paid on it. [524] The next year the party who bought it quit claimed it, deeded the property back to my parents. They walked off it. And I have in the 1939 return this notation along with all of the facts concerning the sale of the ranch, many figures——

Mr. Drewes: The witness is testifying from a document which is not in evidence, your Honor.

Mr. Hagerty: Well, he hasn't testified as to the details, he just said——

Mr. Drewes: He said this is the 1939 return. As I understood he was about to read from it, as I understood the witness.

Mr. Hagerty: I don't think so.

(Testimony of Milton H. Olender.)

The Court: You may continue.

A. The note at the bottom of the page was: "Note: The figures and method of handling the above ranch deal was suggested by the special agent at Fresno, California."

I had taken this up with him in detail as to how to arrive at a new cost basis on this property which had originally cost \$30,000, had been sold for \$20,000, and now there was additional cash which made the value higher and the ultimate value in there became a figure somewhere above \$23,000 as the value of the property as of that time.

Mr. Drewes: Your Honor, it is quite apparent to me [525] that we are on a collateral issue now as to details of complicated transactions apparently occurring in 1938, long before this witness acquired his interest in the property. I again renew my objection. It is incompetent, irrelevant and immaterial and request that it be stricken from the record.

The Court: What is the relevancy, counsel?

Mr. Hagerty: He will connect it up with the sale and the loss shown on the sale which is in question here on the partnership return of '46. I think it is 1946.

Mr. Drewes: I don't see how that can be done. The cost basis is shown in the estate tax return of his father. Now, if that is in some way—if he wants to go into that, of course, that is the point from which we start.

The Court: Precisely what is the position of the Government on this Riverdale property?

(Testimony of Milton H. Olender.)

Mr. Drewes: Precisely, the position is this, that this man, this witness enjoyed a substantial capital gain which he did not report and it is evidence submitted on the issue of intent to the very years in question.

The Court: If that be so, if the Government contends that this man enjoyed a substantial capital gain and if that offer is made on the theory of intent to defraud, I think you should allow the latitude of circumstances surrounding the transaction so that there may be a [526] comprehensive knowledge on the part of the Court and the jury as to the underlying facts.

Mr. Drewes: Precisely, your Honor. But the factors which I conceive as being relevant to that inquiry is the relationship between what was received by this defendant when he sold the property as related to the cost basis when he acquired it, which was upon the death of his father.

The Court: That is perfectly true, the acquisition cost as compared with the ultimate disposition cost.

Mr. Drewes: And I fail to see—

The Court: And the price of disposition would be reflected—would reflect the capital gain.

Mr. Drewes: He now testified—

Mr. Lewis: Your Honor, I stipulate to the capital gain but this man has a right to testify why he used one basis instead of another. Every taxpayer is not acquainted with 113 of the Internal Revenue Code.

(Testimony of Milton H. Olender.)

Mr. Shelton: If your Honor please——

Mr. Lewis: This—pardon me——

Mr. Shelton: Back in 1938 Mr. Olender didn't even have an interest in this property. The partnership didn't own it and I think it can be developed that he was preparing that return as the agent of others in that year. It is going back before a period when he had any interest in it. It is [527] strictly collateral.

The Court: I think the witness should be permitted to testify concerning the surrounding circumstances, that is to say the circumstances surrounding his acquisition. The question is interwoven with price and consideration or cost of acquisition on his part, whether it be a bookkeeping figure, whether it be the result of some arithmetical computation, and in addition to that I am interested, and I know the jury will be interested, in what price, if any, he received for it ultimately, in the ultimate sale thereof. But I don't think we should go back to facts which are entirely unrelated to matters which may have affected the prior owners or prior title holders.

Mr. Drewes: I agree with your Honor entirely. The principles are clear.

The Court: Then to that extent where are we now in point of time? He relates—the witness refers to 1938, am I correct? A. 38 and 39.

Mr. Drewes: There was——

The Court: And you read from——

A. The 1939 return, your Honor.

(Testimony of Milton H. Olender.)

The Court: That was not your return?

A. No, that was the return of the partnership which I prepared. [528]

The Court: How did you set up the basic cost when you acquired this property?

A. From this return.

The Court: From this return?

A. Yes, sir.

The Court: Tell me, how did you do that?

A. The property, as I stated, reverted back to my parents and they had received—they made a loss on the property. The selling price was \$20,000 but the additional money——

The Court: Wait a minute—just a moment. The property had reverted to your parents?

A. Again.

The Court: Again. All right.

A. Now, the amount of money which they had received from the party who bought it would then be added to the cost. I should say, should be deducted from the original cost. In other words, the original cost was \$30,000. They had received five or six thousand dollars. That would have reduced the cost. Plus other expenses it came to \$23,000 as the new cost, which was set up by Mr. Mitch of the Internal Revenue.

The Court: What was your starting point on the cost?

A. 1914. [529]

The Court: No. What is the starting point here as when you set it up?

A. In my books?

The Court: Yes.

(Testimony of Milton H. Olender.)

A. 19—well, it wasn't set up in my books. I showed it in the partnership return when it was sold and I used the basis which had been set up by Mr. Mitch in 19—

The Court: What was your cost as to sale? How do you show that total cost?

A. The property—

The Court: The total cost of the property?

A. \$30,000.

The Court: What did you show as to the sale price?

A. \$20,000.

The Court: You showed a loss then?

A. Yes.

The Court: A loss of \$10,000?

A. That's right.

The Court: All right. I understand.

A. Then we received, I believe, five or six thousand dollars, something of that sort, for payment. And naturally when the property came back that amount you had received already, and it reduced the cost of the property to the owners and [530] brought the property down to \$23,000. And while I had forgotten, and I assure you not intentionally, the brief small items of depreciation—I just assumed the \$20,000—had been taken off a few dollars a year—the 20,000 of the cost and the 20,000 of the selling price would balance the thing, and instead of showing a bigger loss than I would have shown had I taken the \$23,000 figure, we practically broke even. I believe there is a loss of \$84 divided up among six people.

(Testimony of Milton H. Olender.)

Q. (By Mr. Hagerty): Mr. Olender, directing your attention now to the time at which you made up the partnership return of 1946 showing the sale of this ranch and indicating a loss thereon. What basis did you use for the original cost price and what basis in determining the loss or the results of the transaction?

A. Well, I took that \$23,000 figure and reduced it to \$20,000. I didn't figure out the depreciation. I just put it down there because had I shown the \$23,000 it would have shown a much bigger loss and I didn't think that was proper.

Q. Well, on the return which is in evidence you show on the schedule, schedule D attached thereto, which is Exhibit P in evidence, you show the cost of this ranch as \$20,000.

A. That is correct. [531]

Q. The gross sale price is \$20,000?

A. Yes, sir.

Q. And the cost of sale is \$84.22, which are the escrow charges and the title insurance charges, is that true? A. Yes, that is true.

Q. And so you set that up as a loss on the transaction, is that right? A. Yes.

Q. At that time did you believe that was a legal and proper way to account for that?

A. Yes, I did. I thought it was proper. There was no substantial profit, as Mr. Drewes has stated. Even if his figure had been used it would have been a very small sum.

Q. Actually this ranch if you had used that

(Testimony of Milton H. Olender.)

basis—using that basis, the ranch actually cost \$23,000, not \$20,000, isn't that correct?

A. That is right.

Mr. Hagerty: Would your Honor like to take the afternoon recess?

The Court: You might go a while longer.

Mr. Drewes: I didn't hear that colloquy between Court and counsel.

The Court: Counsel asked if I would like to take the recess now. We might go a little longer.

Q. (By Mr. Hagerty): Now, you have testified that during [532] the period of time from approximately 1930 to 1939 your father made gifts to you of approximately \$5,000 each year in cash and placed it in the vault in the Olender building in Fresno? A. Yes.

Q. Was that gift for you alone?

A. No, it wasn't. It was for me and my wife.

Q. You testified that you placed that money in 1942 in the safety deposit box in Oakland belonging to you and your wife? A. That's correct.

The Court: Pardon me, counsel, when you say "you placed the money in your safe deposit box in Oakland"—

A. Yes.

The Court: It is your testimony you transferred that from the vault—

A. From Fresno to Oakland.

The Court: —in Fresno to Oakland.

A. Into a joint box with me and my wife on the box.

(Testimony of Milton H. Olender.)

The Court: How much money did you transfer?

A. \$75,000.

The Court: What is the date?

A. In '42—'42 or '43—

Mr. Hagerty: Would it be the date that the box was opened as recorded at the bank or had you— [533]

A. Well, originally in '42 and then transferred to the other box in '43. The first box was not brought in here.

Q. Do you recall the approximate bulk of that currency, how did you handle it from Fresno?

A. I drove up here.

Q. What did you put the currency in?

A. In a safe deposit box.

Q. How did you carry it, in your automobile?

A. Yes. Oh, I had it in a suitcase, I presume.

Q. What denomination of bills did you have?

A. Oh, there were mostly large bills, hundred dollars, five hundred dollars, thousand.

Q. And what size—I mean what dimension, what size? A. Well, they were the new type bills.

Q. By that you mean what?

A. Well, there was a change in currency. I don't know what year. Some year. These were not the old type bills. These were the small bills that are now in use. The bills used to be—the wallet makers used to have to use more material to carry your money in.

The Court: Thousand dollar, five hundred bills and smaller denominations?

(Testimony of Milton H. Olender.)

A. Yes.

Q. (By Mr. Hagerty): I show you two letters, Mr. Olender, written in pencil and ask you if you recognize them? [534]

A. They are letters from my mother to me.

Q. Did you have a correspondence with your mother in reference to the purchase of some investments for her? A. Yes, I did.

Q. And as a result of that correspondence, did you make any arrangements with the Bank of America?

A. I don't quite understand your question, Mr. Hagerty.

Q. Well, you had a safety deposit box in the Bank of America, is that true? A. Oh, yes.

Q. That was in the name of your wife and yourself? A. That's right.

Q. Did you make as a result of this correspondence with your mother any other arrangements with the Bank of America?

A. Yes. Mother and I opened a joint box.

Q. Did you following this correspondence make certain investments for your mother?

A. Yes, I did.

Q. What did you do?

A. I purchased some bonds for her.

Q. What type of bonds were they?

A. They were bearer bonds, Treasury bearer bonds.

Q. And where did you place them?

A. In our joint safe deposit box. [535]

(Testimony of Milton H. Olender.)

Q. Did your mother ever enter that box to your knowledge?

A. I'm not sure if she did or not. I don't know. She probably did, but I wouldn't say that she did.

Q. In your mother's correspondence with you did she ever give you instructions or advice as to the management of the Fresno properties?

Mr. Drewes: Objected to, your Honor, as calling for hearsay testimony.

A. I wish she were here to tell it.

The Court: Do you wish a short recess? We might take a short recess so you may prepare your notes.

Mr. Drewes: Might I address you very briefly, your Honor?

The Court: Yes.

Ladies and gentlemen, the same admonition to you, without repeating the terms thereof, not to discuss the case, not to form an opinion. You may now take a recess.

(The following proceedings heard outside the presence of the jury.)

Mr. Drewes: I wish to proceed with the utmost caution at this stage of the proceeding. I noted in response to a question asked of this witness by his attorney in relating the various things that he did in the operation of the stores he stated that he was always very careful to see that the prices of the goods—— [536]

The Court: I anticipate the question.

(Testimony of Milton H. Olender.)

Mr. Drewes: —to conform to the OPA regulations.

The Court: I anticipate your question. He said he always abided by OPA regulations.

Mr. Drewes: Yes. I wonder then by having opened up the subject it is not proper for the Government to interrogate him with respect to the matter which we offered to introduce at the time the character witness testified. I would ask for a preliminary ruling in the mater rather than to—

The Court: I appreciate your discussing this out of the presence of the jury. I think it is good deportment in the trial of the case. Both counsels acquitted themselves very well in this trial. I think I will allow the question on cross-examination of the witness. The witness brought it out and I think it is proper cross-examination at this stage of the case.

Mr. Drewes: Very well, your Honor.

The Court: And counsel on redirect may explain it and such matters as may be relevant. But I think now the question is entirely open for discussion.

Mr. Drewes: Would you get the file, Mr. Clerk, during the recess?

The Court: This question of the Riverdale property—may I address both counsel on the matter of the Riverdale [537] property. I think it is a little bit confusing as it now sits in the record, as it is now situated.

Mr. Drewes: The Government's position is quite clear as the record stands.

(Testimony of Milton H. Olender.)

The Court: I appreciate your position.

Mr. Drewes: We contend it is a capital gain of over \$2,000 which was not reported, and simply related by the evaluation in the father's estate plus the return.

The Court: Have you a breakdown on these figures?

Mr. Drewes: I believe they are in the record, your Honor. His one-sixth interest of the property at the evaluation shown in his father's tax return.

The Court: The thought I had in mind—I tried to situate myself in the trial of this case as the ordinary juror. And now these cases are not easy for jurors, and I know that going through the minds of probably the majority of them there will be a query: What is a capital gain? Well, a capital gain, half of them never heard of a capital gain. And I say, in deference to both sides, as you go along, explain the terms as you go along. I allow latitude in these cases. I like to try them with both trials open, so to speak. I like to have both sides heard. With respect to the reception of evidence, I am rather broad in my view. I think both sides should have an opportunity of being heard, within the realms of relevancy [538] and materiality. But as you go along explain as best you can what you mean by capital gains, what his concept of the capital gain is, what the witness' concept is, I may be incorrect but I feel rather that the jurors are a little bit confused. I may have confused them by inquiring, I don't know. I try not

(Testimony of Milton H. Olender.)

to intrude myself, and if at any time I do by questioning, it is not, and I will charge the jury hereafter, not a reflection upon a given witness, be it the defendant or anyone else. It is rather in a desire to elicit facts, as illustrative in connection with the inventory. In none of those questions was it intended by me to embarrass the witness on the stand, and I will instruct the jury at the proper time.

It struck me as a commentary and somewhat as an anomaly that in this type of business he would not have some stock record, however meager it may be, however meager it may be. I may be incorrect. It may be that in his type of business you just take a wholesale look at things and break it down at the end of the year and take a gross inventory at that time. But I say that deferentially to the defendant. It seems to me also that invoices might well be kept and probably should be of the sales and the purchases, at least a ticket of some kind, a sales ticket of the sale.

Mr. Hagerty: One thing I did not bring out, from the [539] defendant yet, his records at the present time——

The Court: For instance, I asked about the sale of 20 sailor suits. Those 322 suits found their way into the inventory out of the blue from an accounting viewpoint. They just fly into the inventory unadorned. The explanatory note in the breakdown which was submitted to the Court demonstrates that there was a differential of some \$8,000 odd dollars —\$8,033. I haven't the figures before me but my

(Testimony of Milton H. Olender.)

recollection is around \$8,000. Now, they just couldn't fly into that inventory. There must be some rationalization on that. I don't know whether your accountant will rationalize it or not. But some place along the line there should be, subject to the examination by the Government, some rationalization.

Now those matters occur to me as I go along, and I think they might well be explained.

Was the introduction into the inventory of 322 suits an afterthought?

Did it find its way in there as the result of matters that may not thus far appear in the record?

I do not know.

How do we account for the difference between the price inventory and the amount otherwise reflected?

Is it a fact, counsel, that there are no invoices or records with respect to the sales at all, the sales invoices [540] at all?

Mr. Lewis: That's right, your Honor. You see——

The Court: For instance——

Mr. Lewis: They just ring up the sale. I think the procedure there was, after all, there were only two or three people selling merchandise in the store, and they would ring up a sale on the cash register. They didn't break it down. A man came in and bought a sailor's suit, bought a cap and shoes. They didn't break it down to those items. If it sold for \$41 in toto that was it.

Mr. Shelton: It is our understanding, if your

(Testimony of Milton H. Olender.)

Honor please, that there was a difference between the ordinary transactions and these sailor suit transactions. That these were started by Olender as a frolic of his own, so to speak, outside of his business procedures. That they were sold through third persons, such as Levy who testified here on this stand, and in that respect, to the sale of the sailor suits the record should be more complete in detail than should there be with respect to three dollar shirts and other things sold for cash over the counter.

The Court: Well, it may be the subject of explanation hereafter. But how under the present mode of operation this man could arrive at a profit and loss I do not know. I can't tell from any accepted accounting practice how he could arrive at any profit or loss. Now, we have as to [541] sailor suit transaction, half of it is in the air, half of it is flying around in the limbo of uncertainty. A piece of it finds its way into the inventory unadorned. The witness, I asked the witness a simple question of a journal entry, and he tells me he doesn't understand the meaning of a journal entry. Now that is incredible, that this man after studying in a university does not know what a journal entry is. I cannot believe that, I will be very frank.

Mr. Olender: Your Honor—

The Court: I don't care to hear from you. I am not reflecting upon the testimony, but the reason I ask the questions is to attempt to clarify in my own

(Testimony of Milton H. Olender.)

mind what apparently is a rather unusual situation. It is extremely unusual.

Mr. Hagerty: We appreciate that, your Honor. I think that it might be explained in that sudden mushrooming of this witness' business. As he testified, in 1939 or 40 I guess——

The Court: To what extent do you disagree with the breakdown here on the board as to liabilities? After all, I assume you will have your own statement on that?

Mr. Lewis: Yes, I have them with me and I have shown them to counsel and I will hand them up to you.

The Court: No. Possibly it wouldn't be the proper time. [542] I want to assimilate it as I go along.

Mr. Lewis: Well, we come out with a totally different figure from the Government. We come out with, assuming that all of the facts that have gone into evidence now are adopted by the jury, we would have an overstatement of income of \$39.08.

The Court: How do you treat the \$10,000 item of Asturias stock?

Mr. Lewis: The Asturias stock your Honor, we treat it—that is covered by the stipulation as to the right way to handle it, the same as these capital gains. We were just showing that leaving it out of Mr. Ringo's statement was not an intentional thing to again himself into a position of filing a false oath with the Government.

(Testimony of Milton H. Olender.)

Mr. Drewes: The Asturias isn't in the stipulation, is it?

Mr. Lewis: I think we included the \$10,000.

Mr. Shelton: That was left out, Mr. Lewis. An examination will show.

The Court: What was the net result according to your theory, counsel, if you are prepared to disclose it, on the matter of the Goodman transactions? Did he suffer a loss or a gain?

Mr. Lewis: No, there was no profit whatsoever, except the normal profit that he would make when he put these suits [543] into inventory, he made his usual profit on them. But as to the suits sold through Levy, those sales were just a wash transaction.

The Court: Well then, you are in sharp conflict.

Mr. Lewis: Very sharp conflict.

The Court: And you proceed I take it, from the stipulated figures, do you?

Mr. Lewis: We started out with—ours is made on this basis; we take the net worth as per the Government's computation, that is, on which they base these figures. Then we take the cash in the box, this \$1,000 check that I'm going to have the accountant explain, the \$20,550 which Goodman had at the time Judge Friedman and the defendant were in the box.

The Court: \$20,000?

Mr. Lewis: \$20,550. Those cashier's checks that went out—or the merchandise was not in inventory at that time but it was on hand in 1944. Then we

(Testimony of Milton H. Olender.)

take the overstatement of the accounts payable like the Smith transaction that we discussed the other day, which amounts to \$6,903.02. Then we deduct the mother's bonds and we come to a net worth increase for 1945 of \$28,161.20. Then we add to that the \$19,081.32 that is stipulated that year, and we reach a total income of \$47,242.52, and then we deduct there, because it was a capital gain and appears in [544] the total one-half for that year, which is in the stipulation, 13977. Then we add the gifts from the mother, the \$575 from Mrs. Widrin, the gifts or the money from Mrs. Foote in 1945, and we reach a figure of \$6,075 of net taxable income, and we come out with a tax on that that is \$39.86 less than taxpayer paid, and we go through the same process in 1946 and we include the \$863.73 of I. Magnin's, and the \$1,391.01 as a non-deductible expenditure——

The Court: There is I take it—I am trying to project my thinking to the end of the trial—this case is going to resolve itself into a conflict between the experts and their interpretation of these figures, is that it?

Mr. Lewis: Yes, and whether—of course, it will eventually resolve itself into whether they believe the defendant's testimony.

The Court: What significance, counsel, do you attach to the matter of \$74,000 into the accounts here.

Mr. Drewes: We have allowed in our stipulation \$50,000——

(Testimony of Milton H. Olender.)

Mr. Shelton: Not in the stipulation but otherwise.

Mr. Drewes: Otherwise. Not in the stipulation.

The Court: You are not concerned with the source of the \$74,000, are you?

Mr. Drewes: We contend that he had fifty of it in 1944. We give him that. That is based on the Government's Exhibit identified by Ringo, where he accounted for disposition [545] of the 75. We say he had fifty of it left at the start of the year.

The Court: That is your start?

Mr. Drewes: Yes, which is based on what we contend is his own statement in the matter essentially. We don't know where it came from.

Mr. Lewis: To show how that figures works out—

The Court: Those are matters of inference to be drawn from the testimony. One person may infer one way and another may infer another way. One person may believe he had the money in the bank and another person may disbelieve. One person may say that the money had been accumulated over a period of years in his business. I don't know. It is a question of his credibility.

Mr. Lewis: That is correct. That is essentially what it comes down to, your Honor. The items on which there is any controversy as to actual transaction, they are very small in this case.

The Court: As I perceive it, there are not too many instances wherein you are at cross-points.

(Testimony of Milton H. Olender.)

Mr. Drewes: That's right.

Mr. Lewis: That's right.

The Court: The Goodman transaction: you brought in this other matter now as to cash.

Mr. Lewis: Yes. [546]

The Court: You have already oriented yourselves as to the \$50,000.

Mr. Shelton: As to Asturias, if your Honor please——

The Court: That is probably open to debate.

Mr. Lewis: We are not contesting, as your Honor——

Mr. Hagerty: We just found that, this note, in running through the files.

The Court: That is open to debate, that \$10,000 item. I think that is open to debate.

Mr. Lewis: Well, we included in the—we are not contesting this as a taxable item. The question—what we were putting in evidence on was to show that an average businessman, when he had something that was worth—in fact to foresee the attack to be made upon the credibility of the witness, because there was \$5,000 of that that he purchased that he did not include in any statement——

The Court: All right. I think I have the issues in mind.

Mr. Shelton: Just one question for clarification, if your Honor please.

The Court: Yes.

Mr. Shelton: Mr. Lewis, you have not included that 10,000 Asturias in here, have you?

(Testimony of Milton H. Olender.)

Mr. Lewis: Yes. As stock or advances. We start with exactly the same figure that you do and show what [547] we disagree with.

Mr. Drewes: If your Honor please, at this time for the record may I ask counsel if they were able to locate George Goodman invoices to Mr. Olender dated June 8th and June 14th?

Mr. Hagerty: No.

Mr. Lewis: No, we have not.

Mr. Hagerty: But I will tell you what we will do, we will make a further search tonight. But the defendant says he doesn't even recognize those.

Mr. Drewes: Well, he so testified.

Mr. Hagerty: Yes.

The Court: We'll take a short recess.

(Recess.)

Redirect Examination

(Continued)

By Mr. Hagerty:

Q. Mr. Olender, yesterday in cross-examination Mr. Drewes asked you whether or not you had made gift tax returns on the gifts that your father had given you? A. Yes.

Q. Do you know anything about the gift tax laws? A. I did not.

Q. Now a while ago, Mr. Olender, you were relating your duties in the store and you mentioned that you had to price all your merchandise with the markings according to regulations of the [548] OPA? A. That is correct.

(Testimony of Milton H. Olender.)

Q. When did you first start doing that, do you know?

A. Well, when the OPA regulations went into effect. I don't remember the date.

Q. Now subsequent to that did you ever have any difficulties with the OPA?

A. No, I did not.

Q. Well, did you ever have any litigation involving the OPA? A. I did, yes.

Q. I see. How did that—what happened in that, can you explain that to the ladies and gentlemen of the jury?

A. Well, the litigation came over the ceiling price of sailor suits, and there was a general indictment of every merchant in the Bay district, quite a list of names, and people who were selling sailor suits above ceiling prices.

Q. Let me ask you one question. Do you know what the word "indictment" means?

A. No, I don't. I do now, in my case.

Q. Well, did you mean all the merchants in the Bay area were indicted?

A. I don't mean the word indicted. There was a restraining order or something, something happened and the following merchants were cited for having violated. I don't say indicted. Cited perhaps is a better word. [549]

Q. Well, in your own case, what was the outgrowth of this litigation with the OPA, what happened?

A. Well, to the best of my knowledge at that

(Testimony of Milton H. Olender.)

time the OPA, the way it worked, it is slightly different now, the OPA—it is the OPS—but the OPA, you paid so much money for an item and you established a base price, and that was your price. You established that but putting in your chart the ceiling price of your items. There were a great many items that were exempted at that time as there are now in the present OPS. No military items are included. You can sell them at any price, as far as I know. I am not sure, but we have been told that, that military items are not an item of—subject to regulations. At that time also there were different prices in all parts of the country. I learned that later they had set up ceilings on the suits. At New York there was one ceiling price. In Seattle there was another ceiling price. At Los Angeles there was another one. In Oakland there was another one. Wherever you went they had a different price. Well, if you happened to buy your suits in New York, which had maybe a much higher ceiling price, and you got it out here, they said, “Why, you can’t sell them any more than that.” Well, at that time I had been paying \$33 for sailor suits, as the invoices I have will show, and they said the ceiling price was 33.50. Well, I couldn’t stay in business very long selling suits for [550] \$33.50 and making fifty and altering them, and I never charged over \$45 for my suits at that time. Many of these merchants, I learned, were getting 60, 65, 70, all prices. I didn’t do that.

Q. Well, tell me this, Mr. Olender, as the re-

(Testimony of Milton H. Olender.)

sult of this litigation with the OPA did they enter into a—

Mr. Drewes: Objected to as a leading question, your Honor.

The Court: Overruled.

Q. (By Mr. Hagerty): Did they enter into a consent decree with you whereby they agreed that you had no intent to violate the OPA regulation?

A. Yes, they did. They said that any violation I made had been purely unintentional. I might add, Mr. Hagerty, that I never had any other OPA trouble during the entire period of the war nor have I had any OPS trouble during this period.

Q. Now, Mr. Olender, directing your attention to the year—your income tax returns for the years 1944 and 1946, where you and your wife, at the time of filing those returns, did you believe that you had correctly and fully stated all your taxable income?

A. I most certainly did.

Q. Did you at the time of filing those returns or during the course of the years 1945 and 1946 ever intend to evade [551] or violate the income tax laws of the United States? A. I did not.

Mr. Hagerty: You may cross-examine.

Recross-Examination

By Mr. Drewes:

Q. Mr. Olender, I show you the Government's Exhibit number 24, your comparative net worth statements and number 25 for identification, which

(Testimony of Milton H. Olender.)

has been identified as supporting data for 24. I will ask you to look at Exhibit 3, page 1 of Government 25 for identification, Mr. Olender.

A. Yes, sir.

Q. Do you have page 3?

A. Oh, I'm sorry.

Q. Pardon me. Exhibit 3, page 1. You note item 12, Asturias Export Corporation \$5,000?

A. Yes, sir.

Q. And if you will look then on the next page you will see item 12 that reads "Personal check to Asturias Export and Import Company 12/12/46," does it not?

A. Yes, sir, and that is an error.

Q. That, Mr. Olender, is the second of your two investments in Asturias, is that correct?

A. Mr. Ringo made a mistake.

Q. Will you just answer my question, Mr. Olender? A. I don't know. [552]

Q. You made two—— A. That's correct.

Q. ——contributions to Asturias?

A. That's correct.

Q. The first was made in July of 1946?

A. That's correct.

Q. Is that correct? A. That's correct.

Q. The second was made in December of 1946?

A. That's correct.

Q. The item shown here is the second of those two contributions, is it not?

A. It shows the stock——

(Testimony of Milton H. Olender.)

Q. Will you answer my question, please, Mr. Olender? A. Repeat the question.

Q. The second—the item shown on page 2, Exhibit 3, is the second of those two contributions, is it not?

A. It is an error. It may be, but it is an error.

Q. Is your answer, Mr. Olender, that that is the second of the two contributions?

A. It is the second check issued to Asturias corporation.

Q. All right. And why, Mr. Olender, did you include the second rather than the first contribution?

A. I didn't include it. Mr. Ringo did.

Q. The date which is set forth in Exhibit 3, stocks and bonds, [553] is the supporting data for Government Exhibit number 24, is it not? Will you look at Government Exhibit number 24?

A. Yes, sir.

Q. And as to Exhibit number 24, you swore, did you not, that it was true and accurate and complete?

A. To the best of my knowledge.

Q. Mr. Olender, you have given us the names of an extended—strike that. You have given us the names of a number of agents and employees of the Bureau of Internal Revenue who have aided you and assisted you in the preparation of returns in the years past? A. Yes, sir.

Q. You mentioned the names of several in Fresno? A. Yes, sir.

Q. That goes back a number of years?

(Testimony of Milton H. Olender.)

A. That goes back to 19—the early twenties and so on.

Q. Will you state for the record the names of the agents, if any, who helped you prepare your 1945 and 46 returns which are in the record in this action? A. I don't remember.

Q. I show you, Mr. Olender, the Defendant's Exhibit number N which is the inventory—which are the inventory sheets of the 1st of January, 1945. Calling your attention to page 45 thereof there appears the item "105 sailor suits [554] at \$23 each." State if you will the source of those suits.

A. I don't know.

Q. I show you again the Defendant's Exhibit P, which is the partnership return for the year 1946, and the schedule which is included therewith. The schedule, as you have heretofore testified, shows that the property therein described, the Riverdale ranch, was sold for \$20,000 and that the cost price was \$20,000. That would result in no capital gain, is that correct, Mr. Olender? A. I believe so.

Q. Mr. Olender, what is a capital gain?

A. It is a profit that you make, I presume, on the sale of property.

Q. On the sale of property. Would you say a profit on a sale of property as distinct from a profit from trading in goods? A. Oh, yes.

Q. In the regular course of business?

A. Yes.

Q. Or income from earnings or salary or so on?

A. That is correct.

(Testimony of Milton H. Olender.)

Q. A tax is levied on capital gains by the United States Government? A. Yes.

Q. And how is the gain measured for the purpose of arriving at the tax, Mr. Olender? [555]

A. Well, I don't know the exact rules there. You don't pay the entire profit. For instance, if you were to make ten thousand profit on it, there is a certain amount of it which is deducted. It's varied over the years. It was, there was one time where it was 25 or 50 or 75 per cent, different percentages. And then you pay a profit on—or a tax on the ultimate figure, the lowest figure.

Q. And the percentage varies, does it not, depending upon how long you have held the property?

A. Depending upon how long you have held the property, whether you have it under a year or so, over so many years.

Q. However, the profit itself is measured by deducting from the price received the cost of the goods? A. That's right.

Q. Or the cost of the asset to the taxpayer, is that correct? A. That's right.

Q. If the asset is acquired by purchase, how is the base measured?

A. Well, you take the original purchase price.

Q. The purchase price, is that correct?

A. That's correct.

Q. And if the asset is acquired by inheritance, how is the base measured?

A. I know now. I didn't know then. [556]

Q. Well, state how.

(Testimony of Milton H. Olender.)

A. I assume now it is based on the appraisal value at the time of death.

Q. Now, you have stated in connection with your father's estate you did considerable amount of work, I believe, and that work consisted primarily of establishing the evaluations as to the real property which were included in that estate? Now, Mr. Olender, I show you the Government Exhibit number 46 and call your attention particularly to schedule A thereof wherein it is shown that the one-half value of the Riverdale ranch is the sum of \$3,950 and I ask you how that evaluation was arrived at?

A. I believe through the officers of the State Inheritance Tax Appraiser.

Q. And did you assist in the determination of that evaluation?

A. I never from him got his figure.

Q. That is not the question.

May that be stricken as non-responsive, your Honor?

The Court: Yes, that may go out.

A. Yes, I did.

Q. (By Mr. Drewes): Will you describe what you did? A. I merely talked to the man.

Q. And did you turn any information requested of you in connection with that item over to [557] him? A. I don't remember now.

Q. Now, you stated in response to my questions on cross-examination, I believe, that you had a one-sixth interest in that property?

A. That is correct.

(Testimony of Milton H. Olender.)

Q. And that is a one-third interest of the one-half? A. That is correct.

Q. Which is included in your father's estate, is that correct? A. That is correct.

Q. You stated, I believe in response to my earlier question, and as is shown in the partnership return which you have in front of you for 1946, that the property was sold for \$20,000, is that correct? A. That's correct.

Q. And a one-sixth interest in 20,000 is the sum of \$3,333, and some odd cents, is that correct?

A. That's correct.

Q. And on the basis which appears on your father's estate tax return a one-third interest based on the evaluation of \$3,950 is \$1,317 and some odd cents, is that correct? A. Approximately.

Q. Therefore there was a capital gain realized in the amount of \$2,016 and some odd cents, is that correct? A. I believe so. [558]

Q. Mr. Olender, in response to some questions that were asked of you by Mr. Hagerty I understood you to testify that you had attempted to make two large purchases of sailor suits. I think you said in the year of 1945?

A. I am not sure of the year. I believe they are on my books, whatever year they are.

Q. That is what I am leading to. You say they are on your books? A. Yes.

Q. How do you know? You told me you didn't know anything about the books?

A. I looked at them today.

(Testimony of Milton H. Olender.)

Q. As a matter of fact, Mr. Olender, there are many entries in those books which are made in your own hand?

A. I can't find any. There may be. I don't know of them.

Q. Exhibit H for the defendant is in evidence as your general ledger. I am going to show you Exhibit H. Call your attention to page 49. In green ink printed in pen 49, 50, 51, there are many entries thereon. Aren't those in your handwriting, Mr. Olender?

A. No, sir, none of them.

Q. In whose handwriting are they?

A. Miss Vera Manger—or Mrs. Vera Manger.

Q. Will you look at pages 52 and 53? Are any of those entries in your handwriting? [559]

A. No, sir.

Q. The lower right hand side of page 53 there appears to be a number of entries in a different script. In whose handwriting are they?

A. My daughter-in-law, Virginia Busby.

Q. Mr. Olender, you testified in response to questions asked of you by Mr. Hagerty in connection with a civil action brought against you by the Office of Price Administrator during the war.

A. Yes, sir.

Q. And did I understand you to say that in connection with your testimony that the OPA officials had agreed that you had not intended to——

A. I believe the paper—I have never seen that paper. I have only heard the statements in this

(Testimony of Milton H. Olender.)

Court read by the Judge, that the violations were purely unintentional.

Q. Do I understand you to say that the Government agreed with your contentions that the violations were unintentional?

A. They must have. That is what it said.

The Court: I think the record should be indicated.

Mr. Drewes: I was going to amplify by reading the stipulation.

The Court: Yes.

Mr. Drewes: The stipulation in this matter.

The Court: There may be a misconception on the part of [560] the jury with respect to the statement made by the defendant on the stand. I merely read to counsel that part of the stipulation which counsel may now refer to. I never at any time characterized the conduct of the defendant one way or the other. The case did not come before this Court nor did I have any knowledge of the matter until such time as the stipulation and the attendant papers were presented to me.

Mr. Drewes: Yes.

The Court: Does that clarify it?

Mr. Drewes: Yes.

The Witness: Yes.

Mr. Drewes: Possibly at this time I should ask then that the file in civil number 22932 G in the United States District Court for the Northern District of California be made a part of the record in this proceeding.

(Testimony of Milton H. Olender.)

The Court: It may be marked.

The Clerk: U. S. Exhibit number 47 in evidence.

(Thereupon the file in number 22932 G was marked U. S. Exhibit number 47 in evidence.)

Mr. Drewes: I will, if I may, your Honor, read to the jury and summarize the contents of this file as I believe it to be pertinent, and, of course, Mr. Hagerty then would have the right to call attention to the jury to any other parts of it which he wishes to call to their attention. [561]

The action to which I have referred was brought in this Court. It was filed on November 15 in 1943, and is numbered as I indicated a moment ago.

The Court: When you say "in this Court" do you mean in the District Court in and for the Northern District of California, Southern Division, not in this particular court?

Mr. Drewes: No, I should have said there are several departments.

The Court: That's right.

Mr. Drewes: —of this Court, which is the District Court for the Northern District of California. The action is entitled Chester Bowles, Price Administrator, Office of Price Administration, plaintiff, vs. Milton H. Olender, doing business as the Army and Navy Store, defendant.

And the first pleading is called Complaint for Injunction, which is in one count in which the Government alleges the basis for its complaint against Mr. Olender, and it sets forth certain violations,

(Testimony of Milton H. Olender.)

alleged violations of the Price Control Law which were in effect at that time in connection with the sale of Navy uniforms. I believe that is the gist of the complaint.

The charge is set forth in something over two pages here but that is what in legal language and at great length is the substance of the charge. [562]

Then there is in the file also what is called a Stipulation for Judgment for Permanent Injunction. The stipulation is an agreement between the parties, and I am going to read that to you. First, several recitals.

“Whereas, plaintiff above named, on behalf of the United States of America, has filed in the above-entitled Court, a complaint in the above-entitled matter, and

“Whereas, in the complaint the plaintiff has charged that the defendant has engaged in actions and practices which constitute a violation of Section 4 (a) of the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress, 2nd Session, C. 26, 56 Stat. 23), hereinafter called the ‘Act,’ in that defendant violated the General Maximum Price Regulation”——

And then the citations of the specific regulations——

“as amended, effective in accordance with the provisions of the Act, and

“Whereas, the defendant claims that the said violation as set forth in the said complaint was unintentional on his part, and the parties hereto desire

(Testimony of Milton H. Olender.)

to avoid the time and expense of proceeding to trial in said action and the plaintiff and the defendant, and each of them is, willing that in full settlement of any and all violations which may have occurred subsequent to the [563] effective date of the said regulation, and up to, and including the date of filing said complaint, that a decree may be entered in the form annexed hereto enjoining the defendant from all further violations.

“Now, Therefore, in full settlement of any and all such violations during the period of time above mentioned, it is hereby stipulated and agreed that:

“1. Defendant waives any and all defenses that he may have to the claims set forth in the complaint herein, and also waives hearing of the matters set forth in said complaint as well as, waives findings of fact and conclusions of law.

“2. A final judgment in the form annexed hereto on behalf of the United States against the defendant without notice at any time hereafter.”

And then it is signed by two gentlemen, who are designated as attorneys for the plaintiff. It is signed by Milton D. Olender.

The Witness: H.

Mr. Drewes: It looked like a D. Milton H. Olender. And, may I correct myself, it is signed first by two attorneys, two Government attorneys for the plaintiff, and then by Milton Olender, and then by his attorney.

The Witness: Would you state the name of the attorney, please? [564]

(Testimony of Milton H. Olender.)

Mr. Drewes: Pardon me?

The Witness: Would you state the name of my attorney?

Mr. Drewes: Monroe Friedman.

The Witness: Thank you.

Mr. Drewes: And then finally there is a judgment. There are recitals in it—the first which referred to the stipulation which I read to you and then there is the following:

“Now, Therefore, It Is Ordered, Adjudged and Decreed, that:

“1. The defendant, his agents, servants, employees, attorneys, and all persons in active concert or participation with the defendant, are hereby enjoined from directly or indirectly selling, delivering or offering for sale or delivery, any ready-made Navy enlisted men’s uniforms in violation of the General Maximum Price Regulation, as heretofore or as may be hereafter amended, and attempting or agreeing to do anything in violation thereof.”

Then it is signed by the U. S. District Judge and dated the 18th of March, 1944.

The Court: Is this a convenient time, counsel? We may take the recess, unless there be some other matter.

Mr. Drewes: No, it is a convenient time your Honor.

The Court: Ladies and gentlemen, we will take the [565] afternoon recess until tomorrow morning at 10 o’clock. With the same admonition not to dis-

cuss the case nor to form an opinion here until the matter is submitted to you.

(Whereupon an adjournment was taken until Thursday, 25 September, 1952, at 10 o'clock a.m.) [565A]

September 25, 1952, 10:00 A.M.

MILTON H. OLENDER

resumed the stand, and having been previously duly sworn, testified further as follows:

Recross-Examination
(Continued)

By Mr. Drewes:

Q. Mr. Olender, yesterday in response to a question asked of you by me you stated that the item of \$5,000 Asturias stock dated as of a date in December which appeared in Government Exhibit 25 for identification was an error. Did you tell your then accountant, Mr. Ringo, about both of the \$5,000 transactions?

A. I don't remember if I did or not.

Q. If you did not tell him about both of the transactions how would he pick up that information?

A. Well, he picked up one check. The other check came from an entirely different account, and he did not pick that up until after my net worth statement was turned in and Mr. Root found that check which was the original check for the purchase of the original stock and showed it to Mr. Ringo.

(Testimony of Milton H. Olender.)

Q. You did not tell him about the other——

A. No.

Q. ——\$5,000.

A. I don't remember if I did or not.

Q. Yesterday you testified, Mr. Olender, that in connection with the preparation of 1938 or '39 partnership return for [566] your father and your uncle you calculated the cost basis of the Riverdale property, is that correct?

A. I got that information from the Internal Revenue Department.

Q. You did prepare the 1939 return?

A. Yes, with the help of the Internal Revenue Department.

Mr. Drewes: May the last part of the answer be stricken as not responsive, your Honor?

The Court: Yes, it may go out.

Q. (By Mr. Drewes): In your preparation for that return it is true, is it not, that you acted as accountant for your father and uncle and that you had no interest yourself in that property?

A. I had not interest at that time, no.

Q. And you were acting for the owners of the property? A. Yes.

Q. Is that right?

A. I presume so. Pardon me, just a moment, Mr. Drewes. My uncle was not alive in '38.

Q. Very well. Nevertheless, your answer is that you had no interest in the property at that time?

A. That is correct.

(Testimony of Milton H. Olender.)

Q. And that the work that you did was for the owners? A. Yes.

Q. Not for yourself? [567] A. Yes.

Q. Mr. Olender, during the course of Mr. Ringo's employment by you in connection with the preparation of your comparative net worth statement by him, did you at any time tell Mr. Ringo that you had received a sum of money from your mother-in-law, Mrs. Foote, in order to qualify her to receive an old age pension?

A. I never mentioned that to Mr. Ringo, to my knowledge.

Q. That you put that money in your vault?

A. I don't remember ever saying that to Mr. Ringo.

Q. And that after her death, Mrs. Foote's death, you then deposited the money in Mrs. Betty Olender's account?

A. Mr. Ringo did not know there was a Betty Olender account.

Q. You have no recollection?

A. No, no recollection whatsoever.

Q. Of ever making such a statement?

A. No, sir, I have not.

Q. Do you deny that you made such a statement?

A. I do not deny that I made such a statement. I have no recollection of ever having made it.

Mr. Drewes: That is all. No further questions of this witness.

(Testimony of Milton H. Olender.)

Further Redirect Examination

By Mr. Hagerty:

Q. Mr. Olender, in connection with the \$2,500 you testified to that was given to you by Mrs. [568] Foote for a specific purpose. What was that specific purpose?

A. That was money that was to be given to my stepson, Mrs. Foote's grandson, when he purchased a home as a down payment.

Q. And what is his name?

A. Richard Raymond Busby.

Q. I show you a bank book on the Bank of America, Oakland Main Office, and also a deposit slip for the same institution, and ask you if you can identify it?

A. The bank book is Mrs. Betty Olender's savings account in the Oakland Bank of America, 12th and Broadway, No. 35225.

Q. And the deposit slip is what?

A. Is a deposit slip made on May the 12th, 1947, in the Bank of America, 12th and Broadway to Account No. 24495 to Richard Raymond Busby.

Mr. Hagerty: At this time, your Honor, I would like to offer these two exhibits into evidence on behalf of the defendant.

The Court: They may be marked.

The Clerk: Defendant's Exhibits T and U in evidence.

(Testimony of Milton H. Olender.)

(Thereupon the bank book and deposit slip were marked defendant's Exhibits T and U in evidence.)

Q. (By Mr. Hagerty): Now on the bank book for Betty Olender, which is defendant's Exhibit T, is there indicated thereon a withdrawal of \$2,500 from that savings account on May 12th, [569] 1947?

A. There is.

Q. And the deposit slip, which is defendant's Exhibit U, does that indicate a deposit made in the amount of \$2,500 to the account of R. R. Busby on the same date, May 12th, 1947?

A. That deposit slip shows that a transfer was made from the numbered account of Betty Olender—the number is on there—to Richard Busby account the same date. In other words, when we go to the bank and make a transfer, like that, you just get a transfer slip and they don't give you the money; they just take it from one counter to the other, and that was what was done in that case.

Q. Now, Mr. Olender, you have testified to having had certain transactions with the Money Back Smith Company in Oakland wherein you purchased certain things for cash, surplus lots that they had, soft goods, but that in error, through error, those purchases were again set up on your books as accounts payable even though you had already paid for them in cash, is that true?

A. That's true.

(Testimony of Milton H. Olender.)

Q. Did you have similar transactions with a firm by the name of Barney? A. Yes.

Q. And when were those transactions, do you recall? [570]

A. Oh, the end of the year, in October, November, December.

Q. And the payment was made how?

A. By cashier's check on the Bank of America, 12th and Broadway, at Mr. Barney's request. He has a letter therein which he requested me to pay it by cashier's check.

Q. Now these amounts, these purchases, show up in error in your accounts payable?

A. They did.

Mr. Drewes: I am going to ask that that be stricken, your Honor. I am going to object to it. This witness has testified that his knowledge of his own books is absolutely abysmal. He knows absolutely nothing of what is in his books. Now with respect to the Money Back Smith transaction, I believe counsel stated that eventually it would be shown that is the fact. It has not been shown. There is no testimony that there is any record by way of admissible evidence that Money Back Smith transactions were handled as stated by this witness.

Mr. Hagerty: Well, this is preliminary, your Honor. We discovered it through our accountants Sunday.

Mr. Drewes: It has been preliminary continually up to this moment.

The Court: Let the accountant testify to it. I

(Testimony of Milton H. Olender.)

think if the accountant has the knowledge, he knows, he can testify to it. [571]

Mr. Hagerty: Could I ask him this question?

Q. Have you learned since that there was an error in the accounting procedure involved in these purchases?

Mr. Drewes: That would be hearsay testimony, your Honor. The accountant can testify.

Mr. Hagerty: All right. We will withdraw it then, your Honor.

Q. Mr. Olender, do you have in your possession those cashier's checks?

A. I will have them here this afternoon, the actual checks, and I will produce a photostatic copy of them after they have been shown here.

Q. Mr. Olender, I show you several invoices here and ask you if you recognize them?

A. Yes, sir.

Q. What are they?

A. They are invoices for merchandise received by my firm.

Mr. Hagerty: At this time, if your Honor please, I would like to offer these invoices in evidence as defendant's exhibit next in order.

Mr. Drewes: I will object to them, your Honor, as immaterial, irrelevant, unless the purpose is so stated.

Mr. Hagerty: The purpose will be, your Honor, to show that we can trace through our accountant—this is all preliminary—we will trace through our accountant the system [572] of bookkeeping that

(Testimony of Milton H. Olender.)

was in effect in the defendant's establishment at that period, and during the period in question under the indictment.

Mr. Drewes: I will withdraw the objection, your Honor.

The Court: That is the purpose of this?

Mr. Hagerty: Yes, we have some others, your Honor, that we just want to show that they were a workable set of books and that the accountant will—there is a question as to the defendant's accountancy ability.

Q. I might ask in reference to these books, Mr. Olender, which are defendant's Exhibits J, I, L, K and H, did you set these books up, these exhibits?

A. No, sir, I did not.

Q. Who set them up in your concern?

A. They were set up by Mrs. Vera Manger.

Q. And she was the part-time bookkeeper you employed?

A. She was my part-time bookkeeper, yes.

Q. Now at the time that Mr. Root first came to your establishment—

The Court: The last invoice may be marked in evidence, Mr. Magee.

The Clerk: Defendant's Exhibit V in evidence.

(Thereupon the described invoice was received in evidence and marked Defendant's Exhibit V.)

Mr. Hagerty: Let me withdraw the question and reframe [573] it.

(Testimony of Milton H. Olender.)

Q. At the time Mr. Root came to your establishment to make a first preliminary investigation or whatever it was in connection with this case, did you give him your books to look over?

A. I gave Mr. Root everything, my books, my inventories, my cancelled checks, my invoices. I gave him everything that I had.

Q. Now did he take the books out of the establishment or did he stay there and examine them?

A. I don't remember, but I don't believe that he took them out.

Q. Well, to your knowledge did he do some work in your place?

A. Oh, he worked there for days.

Q. Have you had these books in your possession in the recent past?

A. I might explain that. I think it will clear the matter up in your Honor's mind. These books have been out of my possession since early 1948. I have not seen them once or twice, except when I have been called on by Mr. Ringo and my counsel in the last week or two to look at them. Since these books are no longer my current books, when this investigation started or shortly before it, I set up the Hadley system which requires only two books and is much simpler to [574] handle. Everything is in two books. And my daughter-in-law is my bookkeeper and is handling those now.

Q. At whose suggestion did you put in that system?

A. I believe it was Mr. Ringo's suggestion. I am

(Testimony of Milton H. Olender.)

not sure, but I believe that he suggested the Hadley system to me. It's much better than what I had. I might add that I said four years. It is nearer five years since I have seen those books.

Q. At this time, Mr. Ringo——

A. Mr. Olender.

Q. What.

A. I am sorry, I am not Mr. Ringo.

Q. Sorry. Let me withdraw it. At this time, Mr. Olender, I will show you some additional invoices and ask you if you can identify them?

A. Yes, I can.

Q. What are they?

A. Well, these are invoices of the Western Military Supply Company, which Mr. Lewis Leavy is the owner, and these are the invoices from Barney's Clothes Shop in Los Angeles.

Q. And what transactions do they cover?

A. Well, these cover transactions which are reflected in my books, the Barney Clothes Shop—two invoices totalling \$2,160.03.

Mr. Drewes: I will object to any further testimony from [575] these documents which are not in evidence, your Honor.

Mr. Hagerty: Oh, yes. Well——

Q. In other words, it is a fair statement to say, Mr. Olender, that these invoices represent transactions by the suppliers with your firm?

A. That's correct.

Mr. Hagerty: At this time, your Honor, I will offer these invoices in evidence.

(Testimony of Milton H. Olender.)

The Court: For the same purpose?

Mr. Hagerty: Yes, your Honor, to trace the—and for also for the additional purpose, to prove that the Barney transaction, the cash purchase that found itself into the accounts payable——

Mr. Drewes: I wish to object, your Honor, on the grounds—with respect to the documents which you now have in front of you, your Honor, you will note that they concern 1944 transactions. If you will look further you will note, your Honor, that there is some correspondence attached thereto in letter form dated 1944, the writer of which is not here for cross-examination.

The Court: What relevancy would these 1944 transactions have? Here is a letter dated 1945 also.

Mr. Drewes: With respect to that particular document, your Honor, I would suggest that it be marked for identification. [576]

The Court: I will mark both of these for identification.

Mr. Drewes: I can't read that one. And I would prefer to have further information.

The Court: It may be marked for identification.

The Clerk: Defendant's Exhibits W and X for identification only.

(Thereupon the documents described hereinbefore were marked Defendant's Exhibits W and X for identification, respectively.)

Q. (By Mr. Hagerty): Mr. Olender, the Western Military Supply, is that firm owned or operated

(Testimony of Milton H. Olender.)

by Mr. Leavy, who was a witness on the stand here for the Government? A. Yes, sir.

Q. Is he one of your principal sources of supply?

A. Well, you will find in checking the invoices that no other ten accounts were equal to his. Many more invoices.

Mr. Hagerty: Your Honor, before we leave this subject, in reference to this Barney transaction, which was partly represented by defendant's W for identification, we would like to offer into evidence the cashier's checks that the defendant used to pay cash for these items which later were reflected as accounts payable, thereby inflating his liabilities.

The Court: They may be marked for identification at this time. [577]

Mr. Hagerty: The checks—we are obtaining the checks from the Bank of America and they will not be available until this afternoon.

The Court: When they arrive they may be marked for identification in association with that exhibit.

Q. (By Mr. Hagerty): Now among your books which are in evidence here there is Exhibit defendant's J which is identified as a general journal?

A. Yes, sir.

Q. Yesterday His Honor asked you or directed some questions to you in reference to a journal, to which I believe you replied you didn't know what a journal was?

A. I don't think I said that.

Q. What did you say?

(Testimony of Milton H. Olender.)

A. Well, His Honor was questioning me about something about a journal entry and I didn't understand his question. I didn't think that he was asking me: Did I know what a journal entry was, because I most certainly do. I have seen thousands of them in my books, hundreds, and I thought he was referring to a specific transaction, and did I make a journal entry or would I make one. My answer evidently confused him because I am still confused about what he asked me.

Q. In other words, you do know what a general journal is? A. I certainly do. [578]

Q. And this is one that was in your own books?

A. That's right.

Q. Defendant's Exhibit J? A. Yes, sir.

Q. Yesterday Mr. Drewes questioned you in reference to handwriting in those books of yours, those various exhibits I have just enumerated.

A. Yes, sir.

Q. Do you find any handwriting of your own in those books?

A. None to do with the books itself. Later when my accountants were working on them there are a few notes in my handwriting referring to some of—what the items were, but no entries of any kind were made by me, none whatsoever. I know in one instance that the girl did not put the date at the beginning of the year in. I wrote above it, "1945," I believe, just so I knew where the year started. She hadn't done it.

Q. And did you offer to give examples of your

(Testimony of Milton H. Olender.)

handwriting to Mr. Drewes and his handwriting experts last night? A. I did.

Q. Were those examinations made?

A. I haven't heard anything since.

Mr. Hagerty: No further questions.

Further Recross-Examination

By Mr. Drewes:

I just have one or two questions in [579] rebuttal.

Q. Mr. Olender, I show you now the well-known defendant's Exhibit N, your inventories, particularly with reference to January 1, 1946, the item of 322 serge suits which you state were in the basement and which were shown at the price of \$24.50. You testified that those suits were the residue of the purchases from Goodman? A. Yes, sir.

Q. The purchases from Goodman were priced at \$25? A. That's correct.

Q. You testified that \$24.50 in that record is an error? A. Yes, sir.

Q. I now show you the defendant's Exhibit V, which has just been put into evidence, identified as invoice to you from the Dewey Sales Company dated in 1946. I ask you to examine it. You will note, will you not, that the invoice covers 100 suits sold to you at the price of \$24.50, is that correct?

A. Yes, sir.

Q. Is it not true that the 322 suits which are shown in the defendant's Exhibit N represents suits

(Testimony of Milton H. Olender.)

purchased on an earlier date from the Dewey Sales Company at the price of \$24.50?

A. How could they, Mr. Drewes? This inventory is of January—— [580]

Q. I said “earlier date.”

A. No, I don't see how they could.

Q. Does not the 322 suits shown as \$24.50 in your Exhibit N represent suits purchased before that date from the Dewey Sales Company at \$24.50?

A. No, sir.

Mr. Drewes: I have no further questions.

Further Redirect Examination

By Mr. Hagerty:

Q. Mr. Olender, yesterday Mr. Drewes examined you in reference to the names of revenue agents who had assisted you in the preparation of income tax returns. Could you give us the names of any of the revenue agents who assisted you in the preparation of your 1945 and 1946 returns?

Mr. Drewes: Objected to, your Honor. That has been asked and answered.

The Court: I think he did answer it maybe in part. He may answer it again.

A. I answered yesterday that I did not know the names of those parties.

Q. Where did you find them when you went to get their assistance?

A. The reason I did not know them—I recited a list of all the names of the agents who had helped

(Testimony of Milton H. Olender.)

me, and I believe the last name I recited was that of Mr. Sitron in the Oakland [581] office, and I went to Mr. Sitron—I don't remember whether it was 43 or 44 for the last time, and he was called into the service, and he was the last person that I contacted in the Oakland office. Immediately thereafter, during the war, the Bank of America—

Mr. Drewes: I ask that this recital be stricken, your Honor, as not responsive.

The Court: Yes, it may go out.

Mr. Drewes: The question was whether or not the witness had assistance in 45 and 46. He testified that he did not in response to my question yesterday. If he wishes to change that—

A. I did not say that I did not have assistance. I said I did not remember the names of the assistants.

Mr. Hagerty: Well, where did you meet these men that assisted you?

Mr. Drewes: May I object to that. The question to be put is if he did, and the answer would be "yes" or "no." And if he did, "Who are they?" I submit that is the proper questioning.

Mr. Hagerty: He testified that he didn't know their names but he did get the assistance.

Q. Why didn't you know the names?

Mr. Drewes: What are the names?

A. If I knew them, I would give them to you, Mr. Drewes. [582]

Q. (By Mr. Hagerty): Where did you meet the men?

(Testimony of Milton H. Olender.)

A. These men were men in the Bank of America, employed by the Bank of America for its customers, and they had different ones each year, and since I had no connections down at the Internal Revenue office since Mr. Sitron had left I went to these men and I did not know their names but they were from the Internal Revenue office and they gave me the assistance that I had been getting from the other men.

Q. Directing your attention now to the Defendant's Exhibit V, the very first sheet thereon, which is an invoice from the Dewey Sales Company pricing certain suits, 100 suits at \$24.50 each, and in connection with which Mr. Drewes had just examined you, were those suits ever in the basement of your concern?

A. I don't that matters, Mr. Hagerty. Mr. Drewes is pointing to my inventory as of January 1st.

Mr. Drewes: I object, as not responsive, your Honor, argumentative.

The Court: Yes, that may go out.

The question is—will you repeat the question, please, Mr. Hagerty?

Mr. Hagerty: I will withdraw it and reframe it.

Q. In reference to the merchandise represented by that invoice did you ever stock it in your basement? [583] A. No.

Q. Can you tell the Court and the ladies and gentlemen of the jury and Mr. Drewes again what suits were the only ones you kept in the basement?

(Testimony of Milton H. Olender.)

A. The Goodman suits. Could I explain this, your Honor. It is so simple and it is an error of Mr. Drewes.

The Court: If you have an explanation——

A. Give me that, will you, please?

Mr. Drewes: The invoice is in front of him, is dated after January 1, 1946. I asked him if he made prior purchases from the same source. That is the only explanation.

A. You asked me if these were not the suits which were included in this inventory. That is what you asked me. [584] And they couldn't possibly be in the inventory when they were bought after the inventory was taken, is that correct?

Mr. Drewes: I did not ask you that question. The record will show, Mr. Olender.

A. Yes, you did.

Mr. Drewes: I did not ask you that question.

Mr. Hagerty: No further questions.

Mr. Drewes: No further questions.

Mr. Hagerty: You may step down, Mr. Olender.

(Witness excused.)

Mr. Hagerty: At this time the defendant will call Roland Hellman.

ROLAND D. HELLMAN

called for the defendant, sworn.

The Clerk: Please state your name, address and your occupation to the Court and to the jury.

A. Roland David Hellman.

(Testimony of Roland D. Hellman.)

Q. Spell your last name. A. H-e-l-l-m-a-n.

Q. Your address?

A. Home address, 315 California Avenue, San Rafael.

Q. And your occupation?

A. Public accountant. [585]

Direct Examination

By Mr. Lewis:

Q. Where is your office, Mr. Hellman?

A. Central Tower Building, 703 Market Street.

Q. How long have you been practicing public accountancy on your own?

A. I have been on my own in practice since a year ago last May, a year and a half approximately.

Q. Are you a registered public accountant in the State of California? A. Yes, sir.

Mr. Hagerty: Mr. Hellman, I wonder if you could raise your voice? I am sure that not everyone can hear you.

A. Yes, sir.

Q. (By Mr. Lewis): What did you do before you started in practicing on your own accountancy?

A. I was an Internal Revenue agent.

Q. How long were you an Internal Revenue agent? A. Five and a half years.

Q. Five and a half years. And to what kind of work were you assigned as an Internal Revenue agent?

A. My general assignment was all income tax cases. I did—I was handling cases involving net

(Testimony of Roland D. Hellman.)

worth statements and I was associated with several cases described as fraud cases or such as net worth statements involved, general line of [586] Revenue agent's work as examining—your assignment would be anything from individuals, corporations, partnerships, and so forth, varying degrees.

Mr. Hagerty: We are still having difficulty in hearing you, Mr. Hellman. Please speak up.

A. Is that better?

Mr. Hagerty: Yes.

Q. (By Mr. Lewis): How many net worth cases do you think you worked on approximately both in the Government and as a private public accountant?

A. Well, it is hard to know exactly. I haven't ever tried to add them up. Probably thirty, forty.

Q. Now, Mr. Hellman, I am going to show you defendant's Exhibit G, which is a thousand dollar check, Army and Navy Store, signed Milton Olender, the defendant here. What is the date of that check?

A. The check was drawn on December 23, 1944.

Q. Did you reconcile—look at the back of it and see if you can see what date it was deposited?

A. The date the check was paid, deposited, on January 10, 1945.

Q. In the stipulation in this case we state and agree: "Cash in bank, the Army and Navy Store (net after outstanding checks), \$19,881.55."

In your reconciliation of the bank account, does that [587] \$19,881.55 include that check, that balance, or is that after that check was issued?

(Testimony of Roland D. Hellman.)

A. That is the balance after this check was issued.

Q. In other words that would show as an outstanding check in a reconciliation of the bank account?

A. It is in the reconciliation that I made. It shows as an outstanding check and it ties in with the books within 71 cents. I didn't have all the figures to reconcile it right down to the penny. I have the reconciliation here if you want to look at it, Mr. Lewis.

Q. Well, we might take a look at that reconciliation.

A. Along with his actual bank statement—there is his bank statement at the end of 1944 and copies of the reconciliation showing the \$1,000 as an outstanding check.

Q. That is check number 2,000?

A. That is the check we have here, number 2,000.

Q. Now—

Your Honor, I might state at this time, as we have this witness on the stand, we are going to propose a simple net worth, just as the schedules of the Government, and then we are going to have Mr. Hellman explain that one, and I am going to have him explain for the benefit of the jury each of these transactions as he goes through that are under debate at the present time.

Q. Then in making up a net worth statement, that \$1,000 [588] would be handled properly how?

(Testimony of Roland D. Hellman.)

A. It would be, according to this, it would be cash on hand of Mr. Olender in his personal possession, not in the store.

Q. And it was not cashed until January 10th, it would not show up in any other asset or bank account until January the tenth?

A. That's correct. We traced that through and found it had been deposited in his account on January the—the date it was cashed, January 10, 1945.

Mr. Lewis: Your Honor, I am going to offer this check into evidence, at this time.

The Court: It will be marked.

The Clerk: Defendant's Exhibit G heretofore marked for identification——

Mr. Drewes: I made an objection, your Honor. The witness testified that he did not have all of the items. I would like to have that matter explored by counsel.

The Court: He said there is a difference of 76 cents.

A. 71 cents, on the bank reconciliation.

Mr. Drewes: That could be the result of several large items in approximately the same amount, could it not? The fact that the difference is only 71 cents in the reconcililation does not mean anything necessarily.

A. Well, there was a list of outstanding checks. You can [589] check—well, let me—if I may have the bank statement. We have the canceled checks here, the outstanding checks. And Mr. Drewes wants

(Testimony of Roland D. Hellman.)

me to explain how to reconcile the bank account. I will.

Inasmuch as the bank statement here up to the period—the bank closes out it as of December 28, 1944. At that date the balance on the bank statement—would you like a copy of it (to the Court)?

Mr. Drewes: It isn't necessary—I did not ask the witness to explain how to reconcile the bank account. He stated that he did not have all the items. I would like to have an elaboration.

A. I did not have the books of—of Mr. Olender—the books of Mr. Olender were in the possession of the Court. I could not trace all of the items to see where somebody made a 71-cent mistake. It can be definitely proven that this 2,000—this check number 2,000 for \$1,000 was one of the checks that were outstanding as of December 31, 1944.

Mr. Drewes: Do you know that that check was included or was not included in the stipulated amount of \$19,000?

A. That is not included in the 19,000 balance—\$19,881.55 balance shown by the books. It had been already subtracted from the total in the books. It was therefore [590] a cash item in Mr. Olender's hand.

Mr. Drewes: How do you know that?

A. Because he deposited it in his personal bank account on January 10, 1945. It must have been in his possession over the year end.

Mr. Drewes: How do you know it is not in the figure of \$19,000, the figure that is stipulated?

(Testimony of Roland D. Hellman.)

A. By looking at the books. You can tell the check was written up and posted as of December, 1944, withdrawal by Mr. Olender from the business, and if the books—the books weren't balanced—there is a trial balance for the books at that period. The books were in balance. Mr. Olender had been charged with drawing out \$8,000 from the business.

Mr. Drewes: Did you compare it—did you verify the \$19,000 figure and the stipulation, compare it with the books of the taxpayer?

A. The balance in the general ledger is the same as in the stipulation, \$19,881.55, cash account—balance in the cash—in the bank for the books, December 31, 1944, was \$19,881.55. Now that is the figure that was presumably—well, I wouldn't say presumably, but it is in the books in pencil. They showed the debits on one side and the credits on the other. That is a pencil figure. Now, I did not run adding machine tapes throughout the year [591] to determine that this pencil addition figure was correct, but it is the same figure you have used in the stipulation, and that is probably why we are off 71 cents. There could have been an error any place during that year. If the books—but presuming the bookkeeper had reconciled her bank balance each month, there is the possibility of a 71 cents mistake in the month of December.

Mr. Drewes: You have relied upon penciled figures in the trial balance as supporting your conclusion that the figure you find in the stipulation does not include the \$1,000?

(Testimony of Roland D. Hellman.)

A. Inasmuch as the figure was used in the stipulation and that is the figure per the books, there is no reason why I shouldn't rely on the books if the reconciliation shows this check is outstanding.

Mr. Drewes: Very well.

The Clerk: Defendant's Exhibit G in evidence.

(Thereupon Defendant's Exhibit, previously marked for identification, G, was received in evidence and marked Defendant's Exhibit G in evidence—check number 2,000 in the amount of \$1,000.)

Q. (By Mr. Lewis): Now, then, Mr. Hellman, will you take the accounts payable. In the first place—

Your Honor, I think it might be all right for him to explain what a ledger is. [592]

Q. Will you explain to the jury what a ledger means? A. A general ledger or just—

Q. General ledger.

A. A general ledger. A general ledger, such as we have here for Mr. Olender, is an account—a list—a chart of accounts or accounts set up in book form in order to reflect balances of assets, liabilities, and capital investment or net worth at various periods.

It is not a source of original entry. Original entries are made into cash journals, cash receipts and cash disbursements, sales records, purchase invoice registers, and from those original entries are the—the summaries are posted to a general ledger.

(Testimony of Roland D. Hellman.)

And in a general double entry bookkeeping system, if all proper entries are made, that is, whether they debit, there have to be offsetting credit, and if all proper entries are made the general ledger is always self-balancing.

You add up the debits and they should equal the credits at any one time.

If they don't, your books are out of balance.

That is how a bookkeeper or an auditor determines whether books are in balance or not. They add up the assets, they add up the liabilities and the capital investment account, and if they are in balance, it is presumed— [593] the books are correct. Of course, there can be errors and compound errors which might make the books still balance but generally speaking if they are in balance they are presumed to be correct.

Q. Now, Mr. Hellman, there has been testimony here as to the Riverdale ranch about the capital gains. According to the transcript, Mr. Drewes states that the capital gain on the Riverdale ranch, if the cost basis had been directly used, was \$2,016. What is the maximum amount of—first, explain to the jury what a capital gain is.

A. Well, a capital gain is represented—is interpreted by the revenue laws for computing income tax, and is the excess of the selling price of an asset which we describe as a capital asset over the cost basis. As an example, if, in the case of real property, you happen to own a home that you paid \$5,000 for and you sold it for \$10,000, you have have a capital

(Testimony of Roland D. Hellman.)

gain of 5,000. If it was held over six months it would be a long term capital gain, and only 50 per cent of the profit would be subject to tax. That is up to the 1952 law.

Q. Now, during the years 1945 and '6, if there was a capital gain of \$2,016, what would be the tax that the taxpayer would have to pay on that capital gain?

A. On \$2,016 there would be, as I say, if it was a long term capital gain, held over six months, you would [594] divide that—take 50 per cent of that, it would be \$1,008, and then if the tax bracket was over 50 per cent, we would use the alternative tax and take 50 per cent of that. So the maximum would be \$504.

Now, if his tax bracket was not 50 per cent, the tax would be computed at the lesser rate, lesser than 50 per cent.

Q. In other words, the maximum tax would be \$504?

A. On that basis, yes.

Q. You have had access to Mr. Olender's books, have you not?

A. Yes, sir, I have.

Q. You also had available and looked over Mr. Saraga's books?

A. I saw them, yes.

Mr. Drewes: Your Honor, at this time I would like to have these Exhibits of the Goodman transaction distributed to the jury to get the accountant's explanation of them.

The Court: We might take the morning recess and then immediately after take up the Goodman transaction.

(Testimony of Roland D. Hellman.)

With the same admonition, ladies and gentlemen, not to discuss the case or form any opinion.

(Recess.) [595]

Q. (By Mr. Lewis): Mr. Hellman, it has been testified to here that \$20,550—"Purchased cashier's checks by cash in January." They were given to Leavy and Leavy paid to Mr. Goodman for merchandise, 822 sailor suits, at \$25 each. They were delivered.

Now, starting with that premise there has been further testimony that Mr. Leavy sold 200 suits at cost for Mr. Olender to Lerman.

You prepared this chart, did you not?

A. Yes, I did.

Q. You have read the transcript in this case?

A. Yes, I have.

Q. Will you start and explain this chart to the jury from an accounting basis?

A. This chart starts out with this \$20,550 cash that Mr. Olender took from his safe deposit box, and we follow it from there. Right to begin with, at the top of the chart, you see Mr. Olender on the left-hand side. On the right side is Mr. Olender's business, which is the Army & Navy Store.

The reason this chart is made up this way is to show the flow of personal funds, some of which went into the business and some of which remained in his personal possession.

Following down from the top, the figure \$20,550, we [596] find the \$5,000 item with the arrows point-

(Testimony of Roland D. Hellman.)

ing to the right. "Leavy sold 250 at cost for Mr. Olender," tracing it through Mr. Olender's books which we have here.

Q. Will you do that right now to see what happened to that \$5,000?

A. It says the \$5,000 was deposited in the store bank account on June 19, 1945. That was handled through the general journal.

Q. Explain what a general journal is?

A. It is a journal used to record entries on the books when you don't have a specific record. For example, if you would have a purchase record to record your purchases, such as we have here, then the entry would not normally be put in the general journal unless it was an unusual transaction. If you have a cash disbursement record, such as we have here, you would not record that in the general journal but other items of an unusual item are recorded in the general journal.

Now, when an item is recorded in there, there are debit and credit offsetting entries and they are both posted to the general ledger which we described earlier, and that general journal is the source of the original entry going into the general ledger. It happened to be Mr. Olender's policy to record the sales through the general journal. He did not have a separate book to record his [597] sales. As I understand the sales weekly or his sales were deposited according to the cash register readings and the week's deposits were added up and an entry was made in a general journal with a debit to cash,

(Testimony of Roland D. Hellman.)

that is, a debit, and the offsetting credit would be to sales. They would have been posted into the general ledger.

Now, in the case of the \$5,000 deposited for merchandise sold to Lerman, on June the 19th, 1945, the general journal shows a debit to cash of \$23,000. Now, we have to offset the debit with an equal amount. A deposit of \$10,000 and a credit to—throughout the books, Mr. Olender is referred to as M. O.—a credit to M. O. Capital Account reinvestment. That is for \$13,000. Now, I have Mr. Olender's duplicate deposit book which I don't suppose is in evidence.

Q. Well, I think you could look it over and show how that is broken up in the investment account.

A. The credit, offsetting credit of \$23,000 was posted to—there had been posted \$23,000 to Mr. Olender's investment account and it was later corrected and \$13,000 to his investment account, and \$10,000 to a liability. If you keep in mind a debit is something that you receive and a credit is something that you give, if your credit is the right hand side, the debit is the left-hand—is the left-hand side of the books, that is, in a double set of books, debits and credits. The \$13,000 credited to the investment account is not detailed in the general [598] ledger. The breakdown of the \$13,000—you really have to go to the bank deposits for that day when they deposited the \$23,000 cash. These are carbon copies of Mr. Olender's deposits; as he made a deposit in

(Testimony of Roland D. Hellman.)

the bank, he used a carbon and the original.

Mr. Drewes: Your Honor, I will have to object to this witness testifying to documents which are not in evidence.

The Court: Do you wish to offer the book?

Mr. Lewis: No, I can't offer the book, your Honor, but I will have to put Mr. Olender on the stand.

(To the witness): Will you step down just a moment?

MILTON OLENDER

called as a witness, having been previously duly sworn, testified as follows:

Redirect Examination

By Mr. Lewis:

Q. Mr. Olender, what is that book?

A. That is a duplicate deposit book.

Q. Whose is it?

A. It is mine, the Army-Navy Store.

Q. Is it kept in the regular course of your business in the Army-Navy Store? A. It is.

Mr. Lewis: Your Honor, I will offer the deposit book into evidence. [599]

The Court: It may be marked.

The Clerk: Defendant's Exhibit Y in evidence.

(The deposit book just referred to was received in evidence and marked Defendants' Exhibit Y.)

Mr. Lewis: That is all.

(Witness excused.)

ROLAND HELLMAN

previously sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Lewis:

Q. Now, Mr. Hellman, will you please look at the deposit slip that corresponds to the investment account statements to which you were just referring?

A. The date in the general journal of June, 1945, when this entry was made debiting cash to the bank for \$23,000, we find that he deposited on June of 1945—made up deposits for \$23,000, broken down as follows: One check in the amount of \$10,000 to represent the money he borrowed from Mr. Blackstone; two checks of \$2,500 each, which were checks through Leavy, and there is a \$5,000 item and a \$3,000 item which represent Cashier's checks deposited that had previously been purchased—Mr. Olender's own cashier's checks.

Q. All right. So as an account practice, then, could you state that the \$5,000 received from Lerman, deposited in the store bank account June 19, 1945, was an additional [600] investment credited to M. Olender capital account on the bank books?

A. Yes, it was.

Q. Now, I will proceed with your—at this point I would like to ask you, was it the effect of entering his wholesale sales on the books of a retail merchant?

A. Entering wholesale sales on the books, a re-

(Testimony of Roland D. Hellman.)

tail merchant would distort the ratio of profit he would realize on a retail sales compared to wholesale sales. For example, a retail merchant's fair markup is between 30 and 40 per cent—let's say 35 per cent, and if a man sold \$1,000 worth of merchandise, he should realize \$350 worth of profit on the merchandise. On wholesale sales, if there is a 10 per cent profit on a sale, a man would only make \$100. If it was a wholesale or a retail transaction, at cost, there would be no profit realized, and if that sale was mingled with a retail sale, it would distort the ratio of profit, thus not allowing the proprietor to have an idea what his over-all profit is, and also a basis of suspicion of anyone examining the books as to whether the books are correct. It is a common practice to determine whether the business is reporting the proper profit by taking the gross profit and determining what it is. If it is in line with other businesses of that type, then it shows that the books would reflect a fair profit, but [601] the entering of an item such as we have here, the \$8,550—this next item, if you note on this schedule on the next side as we bring it down, we have the \$5,000 item we just described below as an \$8,550 item, and below that is a \$7,000 item. Those items back up the \$20,500. Now, the second part of the \$20,500 item—the arrows point to the right there indicating going into the Army-Navy Store for 342 suits unsold by Leavy, transferred to the store, \$8,550. These were not charged to purchases on the store books. This was no expense claim for this merchandise on the books

(Testimony of Roland D. Hellman.)

of the Army-Navy Store. 20 suits were sold through routine sales by ringing them up on the cash register, which is common practice. A lot of businesses have their registers when they have a sale and that is the only record kept of the sale.

By transferring this \$8,550 worth of merchandise into the Army-Navy Store, and by ringing up the sales of the 20 suits on the register and by not charging purchase expense, the cost of the goods purchased on the books, it meant that Mr. Olender contributed \$8,500 worth of merchandise to the store and never took any credit on the books for having done so, which means when the merchandise was sold, it all became profit—that is, profit on the books. He had his original cost when he purchased with cash. By taking the merchandise into inventory, the [602] portion was taken into inventory at the end of '45. By increasing his inventory, it reduced his over-all cost during the year for the other sales made, and that resulted in the understatement of the cost of the goods that he actually sold during the year and resulting in corresponding overstatement of profit of \$8,550 for the year 1945.

Now, due to the failure of the bookkeeper to make an entry on the books recording this credit to Mr. Olender's capital account, when it—at the time the merchandise was taken into inventory, he apparently, as was testified, the bookkeeper was a part-time bookkeeper. Mr. Olender was managing the affairs of the store and he took the inventory.

(Testimony of Roland D. Hellman.)

Mr. Drewes: I will object, your Honor. This is entirely hypothetical.

The Court: What the bookkeeper may have realized may go out.

The Witness: The bookkeeper then failed to record on the books a credit to Mr. Olender, thus, as I previously mentioned, when the profit was determined, it was overstated through the failure to charge purchases and credit; as I told you, you have to have a debit and a credit. You are charging purchases. You have to have an offsetting credit. Mr. Olender's capital account should have been credited, but it was not. As a result, when the [603] merchandise was taken into inventory, the result of that was for it to appear as an additional profit. Profit, when you have your debits and credits, and when the books are balanced, the profit from a business shows up as a credit, the same as the capital account is a credit. Instead of a credit going to the capital account, the credit went to a profit account.

Q. Just a moment, Mr. Hellman, you audited many retail sales organizations?

A. That is correct.

Q. When we refer to the inventory, what generally is common practice throughout the whole retail setup and in stores the equivalent size; where does the bookkeeper get his information for the inventory?

A. The bookkeeper would merely get the total inventory. Now, depending upon the policy—Mr. Olender in this case took the inventory. He made

(Testimony of Roland D. Hellman.)

his own tabulations. In some instances, of course, it might be that the proprietor might take the inventory or the bookkeeper might make the mathematical computation; as Mr. Olender testified, he prepared this himself, and showing a figure as stated on the inventory that would be the figure on the books. This is the type of transactions that aren't in the regular course of business. It wouldn't come through the cash disbursal journal. It would only go [604] through the cash purchase journal. At the end, it is necessary to make an entry to describe the change in inventory, and the entry for that is to debit. First we have an inventory on the books already. Let's get Mr. Olender's inventory account here. I will give you his specific figures here.

In his books, it is described as merchandise inventory. The inventory for the books at the beginning of 1945 was \$85,011.26—wait a minute. At the end of the year, a credit is made crediting in the journal entry here, a credit is made crediting that out of the inventory—crediting a profit and loss account, and a new inventory is set up.

Now, the difference between a new inventory and the old inventory results in either additional costs of sales or, if it happens that the new inventory at the end of the year is greater, then it would reduce the cost of the sales for the year.

In this instance, the new inventory was \$83,394.64. That entry was put through the journal, as was customary, and posted to the merchandise inventory account. Now, that inventory of \$83,394.64 is the in-

(Testimony of Roland D. Hellman.)

ventory shown on Mr. Olender's inventory, which are on exhibit here, and which include \$7989 worth of remaining goods from this Goodman's transaction here, ones that he did not sell for [605] Mr. Leavy—did not sell for him exclusive of the 20 suits, inasmuch as the 20 suits were sold.

Mr. Drewes: If your Honor please, before the witness testifies further on these transactions, I would like to have counsel ask him what source of information he relies on in determining that the 20 suits were taken into inventory for purchase were sold.

Mr. Lewis: He is relying on the defendant's testimony, isn't that correct?

The Witness: That is correct.

Mr. Drewes: Relying entirely on the defendant's testimony?

The Witness: As to this specific item and the inventory records on exhibits. The transactions have to be described some way.

The Court: Counsel asked the additional question: How do you determine the 20 suits were sold?

The Witness: That is a mathematical deduction. For \$20,550, he could buy 822 suits. From the 822 suits, there were 200 hundred that went—200 that were sold to Lerman, and the—200 sold to Lerman, and then the other 240—280 suits were sold for \$7,000. That makes 480 suits which were a cash transaction. They were sold at cost. That left a balance—subtracting the 480 from your 822, you have 342 suits remaining. Mr. Olender's [606] tes-

(Testimony of Roland D. Hellman.)

tified that there were 322 of these suits picked up in the inventory, therefore, 20—it is logical, following in a logical order, that the 20 suits must have been disposed of in the regular course of the business. It reflected an income, as the cash register states.

Q. (By Mr. Lewis): Now, while we are at that point, will you take the cash sales book there and describe to the Court and the jury just how that book is made up in Mr. Olender's operation?

A. The sales?

Q. Yes. What book did they appear in?

A. He does not have a separate sales journal. In some lines of business, they record the daily sales daily. Other businesses, the sales could be summarized. In this business here, Mr. Olender's books were—credits were made to the sales in the general ledger. Now, there is an account called Sales. In the general ledger, there is an account for sales account—sales on the books or credits. When you have such money for a sale, you receive cash. That is an asset. A corresponding entry has to be made to sales. [607]

In the general journal rather than in the cash sales record there are entries—. As an example in looking here in 1945, August, here, weekly, August 6th, August 13th, August 20th, 27th, 31, we close out each month—is complete. There were charges to cash that were posted to the cash account and credits to sales. No, the monthly sales were then posted into the sales account in the general ledger. Now that appears to be the amount of actual record as

(Testimony of Roland D. Hellman.)

far as the books are concerned. The cash debits of course tie in with the bank deposits and that is how the cash items were the same as the credits to sales.

Now throughout the year, let's see,—I don't recognize any sales other than coming through the cash journal as being posted through the sales record. So that you might say that all of the sales were recorded in the general ledger by means of entries, weekly entries into the general journal, which were summarized at the end of the month and posted there into the general ledger, which also ties in with the cash deposits made representing cash sales.

And as I understand the cash—. I believe cash was—not “believe” but the deposits—we have the deposit book in evidence—that's right—the deposit book—the money going into the bank is reflected by the cash shown in the book here, and also the sales—. We don't have register sales records. Mr. Olender testified as to the register sales. [608]

Mr. Lewis: Did your Honor want to say something? The Court motioned. The Court motioned me when I went to ask another question.

The Court: What is it, Mr. Clerk?

(Discussion between the Court and Clerk.)

The Court: One of the representatives of the Government desires to attend a meeting, as I understand it from the Clerk. Is that correct?

The Clerk: Yes.

The Court: Then we will take a recess at this

time and resume at 15 minutes past two, ladies and gentlemen, with the same admonition to you, not to discuss the case under any conditions or circumstances, not to form an opinion till the matter is submitted to you.

(Thereupon an adjournment was taken until 2:15 o'clock p.m. this date.) [609]

September 25, 1952, at 2:15 P. M.

Mr. Lewis: Your Honor, we have the bank here with the bank records that we would like to introduce at this time. Mr. Hellman, will you step down.

CLIFFORD F. CARROLL

called as a witness for the defendant, having been previously sworn, was examined further and testified as follows:

The Clerk: Mr. Carroll, would you please restate your name for the record?

A. Clifford F. Carroll.

Direct Examination

By Mr. Hagerty:

Q. Mr. Carroll, you are an employee of the Bank of America, main office in Oakland, is that true? A. I am.

Q. As part of your duties in that employment you have certain records at the bank, have you?

A. It is.

Q. Certain records to look after?

A. Yes, sir.

(Testimony of Clifford F. Carroll.)

Q. In response to our requests have you brought with you certain cashier's checks?

A. I have.

Q. Could we see them please? (Witness [610] producing.)

Mr. Hagerty: At this time, your Honor please, pursuant to a statement that I made earlier I would like to offer in evidence two cashier's checks of the Bank of America in Oakland, and I would like to offer and substitute photostats for the originals, photostats that correspond to the original cashier checks made payable to——

The Court: What is this in association with?

Mr. Hagerty: This is in association with the transaction of Barney's in Los Angeles.

Mr. Drewes: I would ask that they be marked for identification until they are tied up.

The Court: They may be marked for identification. This involves 100 sailor suits, Barney's?

Mr. Hagerty: I just don't know how many it involves.

The Court: But, in any event, I will mark them for identification. It is part of——

Mr. Hagerty: Yes, part of the transaction that was a bookkeeping error.

The Clerk: Defendant's Exhibit Z for identification only.

(Cashier's checks marked Defendant's Exhibit Z for identification only.)

Q. (By Mr. Hagerty): Did you also bring with

(Testimony of Clifford F. Carroll.)

you, Mr. Carroll, an additional card record of a safe deposit box of the defendant, Mr. Olender? [611]

A. I have.

Q. And what is the number of that safety deposit box card index that you have?

A. The original number was 2912 which was later transferred to box number 56.

Q. And that box number 56, is that the record that you brought the other day and introduced here in Court? A. That is.

Q. I show you here a photostatic copy of the record that you have there. Does that appear to be a true and correct copy of the original record that you have? A. It is.

Mr. Hagerty: At this time, if your Honor please, I wish to offer in evidence this photostatic copy as Defendant's next in order, indicating the earliest date of the box the defendant had in the bank in Oakland.

The Court: It may be marked.

The Clerk: Defendant's Exhibit AA in evidence.

(Safety deposit record card marked Defendant's Exhibit AA in evidence.)

Mr. Hagerty: You may cross-examine.

Cross-Examination

By Mr. Drewes:

Q. Mr. Carrol, in connection with box 2912, subsequently referred to another number, do you know how large that box is? [612]

(Testimony of Clifford F. Carroll.)

A. No I do not.

Q. And further in connection with the Defendant's Exhibit Z the two cashier's checks payable to Barney's Clothes Shop to which you have just testified, did you bring with you the application for these two checks? A. No, I did not.

Q. Did you look for the application?

A. No, sir.

Q. Were you requested——

A. No, sir.

Q. ——to bring an application?

A. No, sir.

Q. Will you do so, Mr. Carroll?

A. I will.

Q. Advise me if the application for these two checks is in the records of the bank.

A. I will look for them when I return to the bank.

Mr. Drewes: Thank you.

Mr. Hagerty: At this time, if it please the Court, I have requested the originals may be returned to Mr. Carroll and we just have the photo-stats in evidence. It will make it that much more easier for him to locate the applications.

Mr. Drewes: I have no objection.

The Court: They may be marked. [613]

The Clerk: Defendant's Exhibit Z heretofore marked for identification now in evidence.

Mr. Hagerty: Here are your originals.

Mr. Drewes: What number did you say, Mr. Clerk?

(Testimony of Clifford F. Carroll.)

The Clerk: They are for identification and are now in evidence.

The Court: They are for identification only?

The Clerk: Yes, sir.

Mr. Hagerty: For identification? I will prove them right now with the defendant.

The Court: These are only now for identification, Mr. Magee, please.

Mr. Hagerty: No further question of Mr. Carroll.

Mr. Drewes: Oh, Mr. Carroll, at the time that you looked for the application for those two checks will you also determine for me the size of this safety deposit box, 2512, can you do that?

A. 2512—

Q. Can you do that?

A. 2512—you mean by the size you mean the size of the dimensions of the box, rates per year to rent the box?

Q. The size, the dimensions of the box.

A. The dimensions of the box?

Q. Yes, and with relation to the sizes that are available. A. What's that? [614]

Q. With relation to the sizes that are available in the bank. A. Oh, yes.

Q. The bank rents boxes of various sizes, does it not? A. Yes.

Q. I would like to know whether that is a smaller box or larger box, or whatever your investigation reveals in that respect.

A. I will do that.

(Testimony of Clifford F. Carroll.)

Mr. Hagerty: And further along that line, Mr. Carroll, would you also ascertain for us the dimensional size of box 56, the transfer box in this case? A. That is box 56 and 2912.

Mr. Hagerty: Thank you, Mr. Carroll.

A. You are welcome.

Mr. Hagerty: Mr. Carroll, just as a reflection, are you sure that this first box, the number is 2512? This is box 2912. The first that bears the number 2912, Mr. Carroll. A. That's correct.

Q. In all events, you will learn for us the dimensions of the original box that Mr. Olender had there and the second one which is designated as number 56? A. That I will do.

Mr. Hagerty: Thank you, Mr. Carroll. [615]

(Witness excused.)

Mr. Hagerty: At this time we will call the defendant to the stand, your Honor.

MILTON H. OLENDER

defendant, having been previously sworn resumed the stand and testified further as follows:

Redirect Examination

(Resumed)

By Mr. Hagerty:

Q. Mr. Olender, I show you here two photostats designated as Defendant's Exhibit Z for identification and ask you if you can identify them?

A. Yes, I can.

Q. What are they?

(Testimony of Milton H. Olender.)

A. They are two cashier's checks, one dated December 12, 1944, for \$248.26 and the other dated November 9, 1944, for \$1,911.77 made out to Barney Clothier Shop.

Q. Can you tell us the source of those checks?

A. At the request of Mr. Barney, from whom I had purchased that amount of merchandise, I purchased these two cashier's checks with cash in the Bank of America and mailed them to him or gave them to his brother. I don't remember just how he got them. They were either mailed or sent through a relative of his.

Q. And these checks were in payment of merchandise you had bought from him?

A. Yes. The Court said a little while ago "sailor suits." [616] They were not for sailor suits. They were for, oh, fifty or sixty items of merchandise on the invoice there.

The Court: Well, I was mistaken in that respect. My recollection is that I referred to them that way. I recall the items now.

Mr. Hagerty: At this time, Mr. Olender, I show you Defendant's Exhibit W for identification and ask you if you could tell his Honor and the ladies and gentlemen of the jury what these checks were used to pay for?

A. These checks were used to pay for these invoices from the Barney Clothes Shop in Los Angeles.

Mr. Hagerty: At this time, if your Honor please, I will offer into evidence the checks indicated as

(Testimony of Milton H. Olender.)

Defendant's Exhibit Z for identification and the invoices which are Exhibit W for identification.

Mr. Drewes: If your Honor please, I have examined both but I haven't compared them. May I do that?

Mr. Hagerty: Surely, yes.

The Court: What is the plain relevancy of this introduction?

Mr. Hagerty: This transaction is part of about \$6,900 worth of purchases that the defendant paid cash for and yet they were taken through a book-keeping error and charged into his accounts payable column. Therefore, they inflated his liabilities and subsequently reduced his net worth, which [617] bookkeeping transaction is—as we will point out here on the records through the accountant—which matter was not discovered by us until last week.

Mr. Drewes: If your Honor please, I missed almost all of that.

The Court: I asked counsel—. I can't see any prejudice results from the statement. He merely added that this transaction relates to a part and parcel of a transaction which was not accounted for in the books to the extent that the accounts payable did not reflect the checks in question. Therefore, when it is considered the net worth will be increased rather than decreased when this transaction is accounted for.

Mr. Hagerty: Yes.

The Court: That is the sum and substance.

Mr. Drewes: Is this another situation wherein

(Testimony of Milton H. Olender.)

the items were presumably picked up as accounts payable although they had in fact been paid for?

Mr. Hagerty: Identical as the slips transaction, yes.

The Court: You claim these matters were discovered by the accountant subsequent to the stipulation being entered into?

Mr. Hagerty: Yes, your Honor.

The Court: All right.

Mr. Drewes: I will ask your Honor that they continue [618] being marked for identification until tied into the books in some fashion.

The Court: Well, the bookkeeper will testify. They may be marked for identification. The bookkeeper will correlate them, I assume, in some way.

Mr. Hagerty: You may cross-examine.

Recross-Examination

By Mr. Drewes:

Q. With respect to these two checks which are Defendant's Exhibit Z for identification, one of them marked \$2484.26, dated December, 1944, and one in the amount of \$1911.77, dated November 9, 1944, Mr. Olender, is it your testimony that you purchased these at the Bank of America?

A. Yes, sir.

Q. And how did you pay for them?

A. With cash.

Q. And from what sources did the cash come?

A. I don't remember now, Mr. Drewes.

(Testimony of Milton H. Olender.)

Q. Do you have any record which would indicate the source? A. No.

Q. The source of cash? A. I haven't.

Q. It was stated by your counsel in response to a question asked of him by the Court that this particular transaction was discovered by your accountants after the stipulation was [619] entered into. Is that correct?

A. I believe so. I didn't work with the accountants. They did all of the work.

Q. Do you recall when?

A. Oh, this last week—oh, probably Sunday, or Monday. Just the last few days.

Q. Did your accountant ask from what source the cash came? A. I don't remember.

Q. You don't remember whether he asked you?

A. I don't remember. I have been asked so many questions lately I don't remember what I have been asked.

Q. There is no question in your mind, Mr. Olender, but that in November and December of 1944 you purchased these two cashier's checks?

A. No, there is no question at all.

Q. Your name, of course, doesn't appear?

A. No, it doesn't.

Q. Neither does the name of the Army and Navy Store? A. No, it doesn't.

Q. You can't remember whether your accountant asked you last week where you got the cash?

A. I don't remember. No.

Mr. Drewes: I have no further questions.

Mr. Hagerty: No questions.

(Witness excused.) [620]

ROLAND D. HELLMAN

called for the defendant, having been previously sworn, continued his direct examination.

Direct Examination

(Resumed)

By Mr. Lewis:

Q. I think at the recess we were at the point where we were determining what the books will show in cash sales, the method of handling cash sales. Checking the item \$8550 on the right hand of the sheet. In explanation of that, I would like to ask Mr. Hellman, from your experience in a business of this size or type, is it the normal procedure where the sales are all cash sales to keep a record for accounting purposes of each individual sale?

A. No, it is not.

Q. Now will you describe the effect—. I will show you the returns of the taxpayer for 1945 and '46, being Government's Exhibits 1 and 2. What is the net income reported on the return for the year ending December 31, 1945?

A. The net income on the return of Milton Olender—

Q. You might combine—

A. You want the total income of the husband and wife?

Q. Yes. A. Before splitting?

A. Yes. The total income.

Q. I think it is right here on the board (indicating blackboard). [621]

(Testimony of Roland D. Hellman.)

A. Total income \$44,718.48. That was before deductions, nonbusiness deductions.

Q. I mean—I want the figure for the unreported net income for 1945, which would be—there is a figure \$46,985.16, is there, on the return?

A. The figure that is shown—

Q. No, I mean \$41,067.61.

A. That figure does not appear right on the return.

Q. Well, does it appear as a combination of the net income on both returns?

A. I do not have Mrs. Olender's return.

Q. I will hand you those returns, which is Exhibit numbers 3 and 4.

Mr. Drewes: We will stipulate to those two figures, your Honor.

Mr. Lewis: All right.

Mr. Drewes: Combined reported net income of husband and wife for the two years.

A. \$41,067.61 is the total net income reported on the two returns for 1945.

Q. (By Mr. Lewis): Now what would be the effect of putting in \$8,550 worth of suits into the inventory without charging it to purchases on the store books on the net income of the taxpayer based upon those figures?

A. The effect on the tax return would be to reduce the [622] profit shown from the business.

Mr. Drewes: If your Honor please, it was my understanding that the Goodman transaction was gone into by the defense not for the purpose of

(Testimony of Roland D. Hellman.)

impeaching the stipulation. I believe that Mr. Lewis so stated. It appears now that the effect of this testimony is to show that the inventory figures in the store as stipulated to were not correct.

Mr. Lewis: No, we claim that they are correct. That these suits were included into the inventory, your Honor, but we are showing that accepting that inventory figure without having a purchase agreement or charging the sales to purchases, that the income of the taxpayer was over reported because he had not charged purchases in his books for this \$8,550.

The Court: Well, it is rather to show a correction or omission, is that correct?

Mr. Lewis: That is right, in income as reported.

The Court: I will allow it.

A. The return shows the merchandise purchased during the year of \$150,458.30. If the \$8,550 would have been added to that, it would have increased the purchases to \$159,008.30. The effect of that would have reduced the profit from the store operations from \$42,722.61 to \$34,172.61, thus reducing the net income reported from \$41,067.61 to \$32,517.61. [623]

Q. (By Mr. Lewis): All right. Now Mr. Hellman, now proceed down through to, on the left hand column, where it states, "280 suits sold by Levy for M. Olender, \$7,000."

A. Following the chart on the left side, as Mr. Lewis pointed out, the \$7,000 represents proceeds

(Testimony of Roland D. Hellman.)

turned over to Mr. Saraga by Mr. Levy for additional merchandise to be bought for Mr. Olender in August of 1945. The cash was not received by Mr. Olender, but Mr. Levy, after making this sale, kept the cash or the proceeds. However, he received the \$7,000, and that was turned over to Mr. Saraga. That is recorded in the books.

Q. Have you Mr. Saraga's books?

A. No, I have Mr. Olender's books, sir.

Q. Will you find that transaction in Mr. Saraga's books?

A. Yes (Examining Saraga's books). On page 84 under date of August 1, 1945, there is an entry cash receipts from Al Levy for \$7,000.09.

Mr. Lewis: Could I show those entries to the jury, your Honor, and let them examine them? (Passed to the jury.)

Q. (By Mr. Lewis): And now——

A. I might explain this cash receipts record. When the entry was made to cash received the offsetting credit for the debit to cash, the credit was to accounts receivable, [624] indicating that Mr. Levy had purchased this amount of merchandise and it was owing and the \$7,000 was in payment for the amount due from L. Levy.

Q. Now take the next two items on your chart, left hand corner, the left hand side, \$7,725.

A. Well, the \$7,000——

Q. I want to show you United States Exhibit number 41. Maybe this will help to explain it.

A. This is a check from M. Saraga dated No-

(Testimony of Roland D. Hellman.)

venber 15, 1945, made payable to the order of the Army and Navy Store in the amount of \$7,725.

Q. Now, is there any part of that check that appears in the books of Mr. Olender?

A. Having previously looked for this item in Mr. Olender's books, I could not locate it.

Q. The \$7,000?

A. The \$7,000, in this store books.

Q. All right, proceeding down to your next—the \$7,725, you have the check there, and it has been testified that that was turned over to Mr. Levy by Mr. Olender for additional merchandise and that Saraga was again unable to deliver the merchandise and he sent a refund check to Mr. Olender, which was deposited to the personal bank account April 5, 1946, and then Saraga sent a new certified check to Mr. Olender and it was deposited in his personal bank account on [625] June 28, 1946. I will show you United States Exhibit number 42. Now I want you to take and look at schedule 2, number 6.

Mr. Drewes: What is schedule 2?

Mr. Lewis: The analysis of the Saraga transaction.

Mr. Drewes: Thank you.

Mr. Lewis: And I would like to have you start now with schedule 2, and I will show you the Defendant's Exhibit O and I would like to have you analyze, starting with that merchandise invoice, Defendant's Exhibit O, 7/31/45, analyze the Saraga account of that invoice and point out also all en-

(Testimony of Roland D. Hellman.)

tries concerning the transaction on the Saraga books and on the defendant's books.

A. The invoice——

Mr. Drewes: If your Honor please, simply in the interest of time, it appears to me that is accumulative evidence and I object to it on that ground. I am under the impression we have gone through this at considerable length. Another witness, you will recall, testified.

Mr. Lewis: Well, your Honor, my only purpose in going through this again is to show that the \$725 out of the \$7,725 check, United States Exhibit number 41, appears and debits the accounts payable in the amount of \$725 under date of November 30, 1945.

Mr. Drewes: My recollection is that evidence has already [626] been offered and is in the record.

The Court: It may be. Do you have anything to add to that?

A. Well, it was possibly to clarify it and show the chain of events, how the \$725 arose and also to point out that the Saraga transactions as being on the books and as it is merely following through, as he says, the other checks, the original checks drawn to Saraga in evidence showing that a total of \$24,500 was paid to Mr. Saraga through Levy and that the invoice which reads for 1,000 suits was changed to read for 951 suits at a total of \$23,775, indicating that if Mr. Olender had paid \$24,500 there would have been a refund of \$725 due from Saraga, which

(Testimony of Roland D. Hellman.)

Saraga did make and add to the other \$7,000, which we were previously talking about, making up the total of \$7,725 that did go into Mr. Olender's personal bank account.

Mr. Lewis: Your Honor, what I wanted to clarify particularly was this check has the wrong statement on it, that it couldn't possibly work out that way, that schedule under \$725 that went into his books, and I might show this to Mr. Drewes. You see, the letters 49 suits at \$25, \$1,225, deposits \$6,500, went in as \$725 and \$7,000 there is what the books referred.

Mr. Drewes: You make your offer, Mr. Lewis.

Q. (By Mr. Lewis): Will you state your analysis as to the [627] Saraga transactions and why from an accounting point of view and from the facts from the books of both Saraga, starting with the invoice, and from Mr. Olender's books, that that check, the notation—the amount is correct—but the notation as to what it was for, why as an accounting point of view that must be incorrect?

A. Inasmuch as Mr. Olender only paid Saraga \$24,500 rather than the amount that is shown on the original invoice of \$25,000, and there were 49 suits that were not delivered, however, the total of the 951 suits that were delivered, the total cost is \$23,775, according to this schedule 2. Now you point out where that appears on Mr. Olender's books.

A. Referring back to schedule 2, item three, there is an entry on July 31, 1945, charging mer-

(Testimony of Roland D. Hellman.)

chandise purchases. It is an entry to merchandise purchases of \$23,775 and setting up a liability, a credit of \$23,775 as owing and then on the same—that was set up as of July 31, the date of the invoice. Now, on July 23, the date that the cashier's checks which had been introduced in evidence were purchased, indicating the cashier's checks drawn for the merchandise—

Q. "C.P. 53"?

A. That is what I have here now.

Q. They are store checks? [628]

A. Those are store checks, made, indicating in the record here of July 23, five checks of \$3,600, totaling \$18,000, and on August 2 one check of \$6,500. These store checks total \$24,500. If we take the \$24,500 that was paid to Mr. Saraga and subtract the corrected amount of the invoice of \$23,775, it would indicate the balance due of that payment, amount refunded to Mr. Olender of \$725. In addition to the \$725 he had the \$7,000 refund coming on schedule 1, which we have previously talked about, making the total amount of the check due from Saraga and the check that was received November 15, of \$7,725.

Q. And that is the check for \$7,725 marked as Exhibit 41?

A. You want that in Mr. Saraga's books, too?

Q. Yes.

A. Mr. Saraga's books under date of October—November 15, check number 2726 was issued to the

(Testimony of Roland D. Hellman.)

Army and Navy Store, Oakland, and noted accounts receivable refund \$7,725.

Q. Then as an accounting matter, what would be your conclusion as to that particular Exhibit 41 as for what the refund was for?

A. Inasmuch as the check describes the refund paid in full of \$7,725, which is the same as Mr. Saraga's books indicate, and that he, Mr. Olender, could not have the \$1,225 refund coming from the 49 suits inasmuch as he [629] hadn't paid the full amount of the invoice of \$25,000—he only paid \$24,500—therefore he could have only had a refund coming of \$725, and inasmuch as the check is in the total amount of \$7,725, \$7,000 would be under the circumstances construed as the deposit rather than 6500, the deposit that Mr. Levy had made and which shows in schedule 1 on the left side, \$7,000 that Mr. Levy had turned over to Mr. Saraga from the proceeds from the 280 suits sold by Levy for Olender.

Mr. Drewes: I would just like to ask this witness upon what records he relied with respect to his last statement that \$7,000 was turned over to Mr. Olender by Mr. Levy. I understood he was comparing Mr. Saraga's books and Mr. Olender's books for the purpose of explaining the \$7,725 receipt by Mr. Olender.

Mr. Lewis: Well, look at the transcript, page 405 or 401, and you will have that.

Mr. Drewes: What records?

Mr. Lewis: From the testimony given that Mr.

(Testimony of Roland D. Hellman.)

Olender permitted Mr. Levy to take the proceeds of 280 suits amounting to \$7,000.

Mr. Drewes: Would you ask the witness, counsel, if he is relying upon the transcript or upon any records of Mr. Saraga or Mr. Olender.

Mr. Lewis: He is correcting the record of Mr. Saraga [630] in that respect.

Mr. Drewes: I wish the question to be propounded to the witness, your Honor.

Mr. Lewis: All right. Read Mr. Drewes' question to the witness.

(Record was read.)

Mr. Lewis: I think the question is in reverse, Mr. Drewes. You mean \$7,000 turned over to Mr. Olender to Mr. Levy.

Mr. Drewes: It went both ways.

Mr. Lewis: It came back from Saraga to Levy, and your Exhibit that you offered in evidence is endorsed Army and Navy Store, Milton Olender, Lewis Levy, by Milton Olender.

Mr. Drewes: I recall.

Mr. Lewis: Is that fair?

Mr. Drewes: Yes.

Mr. Lewis: Your Honor, could we take the recess at this time? I think that is all on this one transaction.

The Court: We will take the afternoon recess, ladies and gentlemen, the same admonition to you not to discuss the case or form an opinion.

(Testimony of Roland D. Hellman.)

I would like to discuss several matters with counsel.

(The following proceedings outside the presence of the jury.) [631]

(Discussion between Court and counsel with reference to a continuance over next Monday; discussion relative to anticipated date of completion of trial.)

The Court: Tell me about this item of \$8,550—"322 suits included inventory December 31, 1945, resulting in understatement cost of goods, on the right hand side of schedule 1. Is the Government in accord with this theory of the accountant?

Mr. Shelton: Your Honor, I think we are definitely not in accord with that. We think that that represents either purchases in 1944, which would be outside the scope of the evidence on understated income or it represents inventory, additional inventory at the close of 1944, which we understand Mr. Lewis definitely stated that at the close of the session of the Court the other day that he was not going to change. We think that on either theory that the \$8,550—I believe that is the right amount—

The Court: That is correct.

Mr. Shelton: —should not go into evidence to impeach the income figures for the year 1945.

The Court: Well, I can't see how—just from an abstraction and not involving any minute accounting—how there is an overstatement of profit of \$8,550 for the year in question.

(Testimony of Roland D. Hellman.)

Mr. Lewis: That is one of the difficulties, [632] your Honor, of the net worth method. It is our contention that the Goodman money, having come out of the books and not being there as of May the 5th, when the affidavit testified to by Judge Friedman, and the statement of the defendant—one said \$75,000, one said in excess of \$70,000—that that money being on its way was additional cash on hand at the year's end 1944.

Now when you take into income in the year 1944, that \$8,550, and do not charge it to purchases during that year, you have understated the cost of purchases by that sum of money which was available in 1944.

Mr. Shelton: If your Honor please, we think that the defense is very definitely mixing up two theories. There is the net worth theory and there is the actual theory of reported and reportable income. In other words, the ordinary specific item theory. Now the testimony, if your Honor please, by the defendant was, as I recall it, that all this merchandise that was bought in the \$20,550 in the eight Goodman checks was delivered prior to the May date. In other words, there can be no question of cash as tied in with the Friedman inventory of the Olender safe deposit box because that money was in inventory, goods or goods sold at that time. I think that Mr. Lewis, in that particular, your Honor, is not on sound ground. Now as to the— [633]

The Court: Just in passing, I will study the matter as the accountant developed the situation,

(Testimony of Roland D. Hellman.)

and I am inclined to agree with counsel for the Government that there is confusion here, that the \$8,550 is not a corresponding overstatement of profit and could not be upon any theory that is applicable in the case.

Now I am open for any arguments that may be persuasive and convincing, but this far I can't follow the theory.

Mr. Hagerty: Well, if your Honor please, yesterday you remember you said how could you take and just throw these things into inventory without a corresponding credit to the capital account. Don't you remember that?

The Court: Well, I remember it precisely.

Mr. Hagerty: Wouldn't that necessarily throw—

The Court: I asked the question of counsel for the reason that credibility is at stake.

Mr. Lewis: That's correct.

The Court: There is no question, the credibility is at stake with the question of the introduction of 342 suits into the inventory, or 322 suits.

Mr. Lewis: That's right.

The Court: The jury may well believe that the 342 suits did not come out of the transaction referred to by the defendant but came out of other purchases. The jury may believe that this transaction affecting Goodman [634] was one that the defendant took unto himself from an accounting viewpoint, and never reflected on the books; that this reflection is an afterthought on his part in order to meet the contention now made by the

(Testimony of Roland D. Hellman.)

Government that the Goodman transaction never hit the books of account at all and that in preparation for the trial this defendant saw on his inventory a suitable explanation and resorted to it.

Now that's open for a jury to debate. It is a question of credibility. That has nothing to do, however, in my humble opinion, with this matter of accounting as such.

When we take the proper theory—322 suits unsold by Levy are allegedly transferred to the store, according to your accounting, his schedule 1. On the basis of \$25 per suit that would result in a figure of \$8,550. Now the accountant contends, and you likewise contend, that there is a corresponding overstatement of profit by \$8,550 because the cost of purchases has never been reflected in your books of account, and, ergo, it follows that therefore there has been an inflation.

Mr. Lewis: Now, we have one——

The Court: At that point we part as a matter of accounting.

Mr. Lewis: That's right. [635]

The Court: We part. Because—well, go ahead.

Mr. Lewis: Well, our contention is, and it will be borne out by our net worth statement, we are not contending here that this particular item in itself constitutes the overstatement we claim in income. We are explaining that that as a matter, bookkeeping matter, is an overstatement, but we are contending also, and more importantly for net worth, as it will be analyzed out, that he had \$20,550

(Testimony of Roland D. Hellman.)

which he purchased cashier's checks for for Goodman in 1944; that he received through sales of those suits \$20,500 or more because we have traced all the sales—they were either made at retail or wholesale, the wholesale sales are definite in amount, the retail sales just appear in the cash register receipts, and that that \$20,500 is available to us in the sense of cash on hand as of December 31, 1944.

The Court: Well, as I understand it, you have 480 suits accounted for either retail or wholesale. You start with a bulk—outside bulk of 822 sailor suits. You sell 280 suits to Levy's for \$7,000, and in addition to that you sell 200 suits at cost in the Lerman transaction. So that gives you 480 suits sold. Where are the other suits?

Mr. Hagerty: 322.

The Court: What? [636]

Mr. Lewis: 342.

Mr. Hagerty: 342 went back in inventory.

The Court: Well, they are in the limbo of some place. I don't know where they are. Where are they?

Mr. Shelton: Your Honor—

The Court: Where are they?

Mr. Hagerty: That is the \$8,550.

The Court: The \$8,550, that goes into the inventory. Were they ever sold?

Mr. Lewis: Yes, they were.

The Court: When, where and under what circumstances?

Mr. Lewis: Well, the accountant testified this

(Testimony of Roland D. Hellman.)

morning when he was talking about the cash sales and this afternoon when I asked him, that under the system as set out by the taxpayer of ringing the cash register and taking off the tape and totaling it up, that during the period of time or during this period of time maybe all of those suits were sold before the end of 1946 or '47.

The Court: We are dealing in conjecture here because you are dealing in a profit, overstatement of profit of \$8,550 here as of a given period of time in 1945. I can't follow your theory, I just can't do it.

Mr. Shelton: And, your Honor, the net worth theory having been resorted to by the Government and it being our basis and we having laid our foundation by showing [637] the inadequacy and incompleteness of the books and records, then it is not open to the defense to rebut it on the specific item basis. [637A] The necessary requirement of the net worth method is that the books and records be inadequate, I think not correct, which we have established, and Mr. Lewis' contention with respect to the purchases seems to me to misfire entirely because these were 1944 purchases and the 1944 was not a prosecution year.

Mr. Lewis: Your Honor——

Mr. Drewes: If your Honor please, may I add this——

The Court: Yes.

Mr. Drewes: ——the \$20,550 assumed by the defendant's theory came out of cash in the vault in

(Testimony of Roland D. Hellman.)

the year 1944 and deliveries were made early in the year 1944. So the very most that that item could represent would be inventory as of the end of 1944. In other words, they were sold in 1944 and converted back into cash or they were on hand at the end of that year. That is all that can be said. They went back into cash or they are still on hand as of that year.

Mr. Lewis: The fallacy of that argument, your Honor, is that the cash came back in 1945 out of those Goodman checks.

The Court: Let me ask the accountant——

A. Those suits——

The Court: You heard our discussion now?

A. Yes. Mr. Drewes said it would represent an inventory item at the end of '44. However, those suits at the end of '44 were still a personal asset. It was not a store asset of Mr. Olender. [638]

The Court: In breaking down the cost, supposing you were to break down the cost now for this defendant, set it up, and you start with the inventory as of the——

A. Beginning of the year.

The Court: ——beginning of the year.

A. That's correct.

The Court: Then what do you do? You start with the inventory at the beginning of the year?

A. That's right.

The Court: All right.

A. And——

The Court: Then what do you do?

A. Add merchandise bought for sale.

(Testimony of Roland D. Hellman.)

The Court: You add merchandise bought for sale?

A. All right. So let's assume an opening inventory of some small round figure——

The Court: Let's call it "X." We will say it is "X" dollars.

A. It is hard to do it with letters. Put down \$10,000.

The Court: All right, put down \$10,000.

A. You will add your purchases. Say you purchase \$20,000.

The Court: That is the cost of the purchase.

A. You add those two together. You have \$30,000. At the end of the year you have \$15,000 inventory.

The Court: All right, \$15,000 inventory. [639]

A. Now in determining your net income you subtract the purchases. You have cost of sales there, you have an inventory of \$15,000. You subtract that from the thirty.

The Court: Right.

A. You have another \$15.

The Court: That is \$15,000.

A. That represents the cost of goods sold for the year.

The Court: That's right.

A. That is subtracted from the gross sales.

The Court: Right.

A. Arriving at the gross profit.

The Court: Yes.

A. Now these——

(Testimony of Roland D. Hellman.)

The Court: There we agree. We agree on that principle.

A. That's right.

The Court: All right. Now apply the principle to the facts here.

A. We contend that the profit was overstated for 1945, for this reason, the items which were on hand at the end of 1944, the suits down in the basement——

The Court: Now let's agree on our premises. When did these suits come into the house from your viewpoint?

A. As far as an accounting viewpoint, they were never reflected on the books until they were taken into inventory at the end of '45. [640]

The Court: At the end of '45?

A. That is correct.

The Court: That is on the inventory in evidence?

A. That's right.

The Court: All right——

A. Now at the end of '44 these suits were a personal asset, now on the store books of Mr. Olender, just as any cash or anything else, they were sitting in the basement. They were not on the books. They were not reflected in the books. Now at the end of 1945, as testified, there were 322 suits left, meaning that he had sold 20 of the 342. Then in taking his inventory at the end of 1945 these suits are added to the value of other merchandise on hand. Now through a bookkeeping error in not recording a purchase and giving Mr. Olender proper credit in his

(Testimony of Roland D. Hellman.)

capital account at the end of '45, it resulted in the inventory, as those figures you have there—if you will just add \$8500 to the closing inventory figure—this little example that you have in front of you—

The Court: I understand. I follow you.

A. —if you will add the \$8500 to that, you would have only the cost of goods sold of \$6500. Subtract the \$8500 from \$15,000. Then if your cost of goods sold were only \$6500, you subtract that from your gross sales and your profit is going to be overstated by \$8500. [641]

Mr. Drewes: If your Honor please—

A. I can diagram that on the board for the jury, if you think it will simplify it.

Mr. Drewes: I wonder if Mr. Mytinger, the technical adviser, might just state the Government's theory for the edification of the Court now. Would that be proper?

The Court: Yes.

Mr. Drewes: Mr. Mytinger, would you explain our view on the matter to the Court?

Mr. Mytinger: Well, I think, your Honor, it sums up to this. They are attempting to separate personal transactions from store transactions. I believe there is no denying that it was \$20,550 that went out in 1944. I think it has been assumed that it went out for sailor suits. There is no evidence, however, how many of those suits were received or sold in 1944 nor how many remained on hand at the end of 1944. However, if there is any inclusion on the records, the business records for the purchases,

(Testimony of Roland D. Hellman.)

it would certainly be in 1944, unless the man is in two separate businesses, and I believe there is no evidence of that.

I think what few transactions were put on the business records were put on the regular business records, the same business.

As you pointed out, I believe, or someone pointed out, there is likewise no item in the closing inventory at the end [642] of 1945 which can be identified as having any relation to this picture.

The Court: That is the observation that I think I made.

Mr. Mytinger: That's right. That is absolutely right.

Mr. Lewis: Your Honor, that, in my opinion, gets us back to the credibility of the witness. He testified that he did place them in the inventory, and if the jury believes him, well and good. If they don't that's it.

Mr. Drewes: That is perfectly true, and there is one further aspect of the case——

The Court: You accept the statement of counsel, that if the jury believes that these items of 342 suits relate to the Goodman transaction and were in truth and in fact part and parcel thereof, that then the jury may consider that there has been an overstatement of profit in the amount of \$8550? Do you agree on that theory?

Mr. Drewes: I am going to refer that to Mr. Mytinger. That is a little too much for me to grasp at one moment.

(Testimony of Roland D. Hellman.)

The Court: In short, does it come down to the question of credibility?

Mr. Mytinger: Yes——

Mr. Lewis: That then reverts to the same thing, as far as the net income is concerned——

Mr. Mytinger: Actually under the facts as thus far known, if such suits did exist at the beginning of 1945 unsold, [643] your understatement is not \$8550, but \$20,500.

Mr. Lewis: Well, that in essence is the way we are working it out. We do that through our net worth by—this is an example of what happened—but we contend that at the end of 1944, it was testified that he didn't run them into inventory because he wanted to sell them wholesale if he could because of the size situation, and so forth. Now we contend that in essence the \$20,550 that started with the Goodman checks in January and were out of the box by the time the count was made was available through checks and through merchandise to raise his net worth at the end of 1944.

Mr. Mytinger: Mr. Lewis, can we eliminate the checks now? There is no question they went out in January, February, something like that, and were cashed.

Mr. Lewis: Well, but he still had an asset, the money due from Saraga, for clothes that he received.

The Court: I assume then the question is not one for the Court but for, in the final analysis, one for the jury with respect to credibility in the light of the testimony that you may offer through your

(Testimony of Roland D. Hellman.)

expert, and you may take the stand and state your contention here, and I will then charge the jury that the matter rests on the question of the credibility of this witness.

Mr. Hagerty: Yes.

Mr. Lewis: Yes. [644]

The Court: I am trying to refine it. I may be incorrect now. I am open to argument. Is it a matter of law for me to rule on or is it a matter of fact for the jury?

Mr. Shelton: Your Honor, I think it is a matter of law on the admitted facts if there was anything it was inventory at the end of '44. It couldn't have been anything but inventory, and if it was inventory then—and the defense is trying to do just exactly what Mr. Lewis told the Court he wasn't doing, impeaching the closing 1944 inventory, if these suits were down in the basement, if your Honor please, as contended by the defendant, they were a part of inventory, and they were no less inventory than if they had been upstairs on the first floor. Inventory is not what the books show. Inventory is a fact. And if these were anything at all, they were inventory at the end of 1944.

The Court: Well now, here, the 342 suits appear on the inventory.

Mr. Shelton: But we don't know whether they are the same suits.

A. It's a year later.

The Court: You gentlemen considered those suits in connection with your stipulation, is that right?

(Testimony of Roland D. Hellman.)

Mr. Shelton: We took the stipulation on the inventory from the defendant's books.

The Court: As I understand it, the figure of \$85,011.26 [645] was the inventory figure stipulated by you? Now, if that had been considered by the Government, as well as by defense counsel, it seems to me that the whole effect of this transaction is an attempt to impeach the integrity of that figure, if you consider it as an opening inventory as of—or the close of business 1944.

Mr. Shelton: It is an attempt further, if your Honor please, by my friend, Mr. Lewis, to get in by the back door and change this inventory figure when he stated to your Honor on the record that he was not going to attack that closing inventory as to 12/31/44.

Mr. Lewis: No.

The Court: May I have, Mr. Magee, the inventory of 12/31/44, please?

Mr. Shelton: A comparison will show, your Honor, that the stipulated inventory is the same as those on the returns. I believe that is right.

Mr. Lewis: That's right.

The Court: Will you check that, please, in the stipulation. May I have the stipulation?

Mr. Shelton: Exhibits 1 and 2, Mr. Magee, should show those inventories. The Court would like to see those.

The Court: Here it is, closing inventory, \$85,011.26.

A. These are in reference to the sailor suits'

(Testimony of Roland D. Hellman.)

inventory? There might be a note—is there a note, “sailor suits,” or [646] “suit inventory” on the page?

The Court: The next to the last page——

A. That is the end of '45. Do you want to look at the beginning of '45 to see if——

The Court: Can you find this for me (to witness).

Mr. Drewes: Is it the 322 suits that you are looking for, your Honor?

The Court: Yes.

A. This is the end of '46 showing that his normal inventory is down here to only 44 suits.

Mr. Drewes: It is 1/12/46, toward the end, as I recall.

Mr. Hagerty: About page 45, I believe.

Mr. Drewes: I am sure I can put my finger on it.

The Court: Now let us analyze this from the standpoint of accounting—I may be incorrect—on the inventory marked 1/1/46—January 1st, 1946—that is the end of 1945.

Mr. Drewes: December 31, 1945.

The Court: Correct. That was taken by the defendant in his own handwriting, under “miscellaneous items, basement No. 1, 322 serge sails suits,” and there is a mark in here in pencil, “75 upstairs,” which is somewhat in conflict with the defendant’s testimony that everything was downstairs. \$24.50 is the cost price per unit and extension of [647] \$789.

Now in arriving, Mr. Accountant, at the cost of

(Testimony of Roland D. Hellman.)

sales in your books, will you turn to your ledger and refer to the figure \$83,394.64—will you get that for me—\$83,394.64? What is the profit shown for that year here?

A. On that basis?

The Court: On this basis.

A. On that basis the profit—

(Thereupon followed inaudible discussion between the Court and the witness.)

The Court: Now, is it not a fact that the 322 serge suits, and the cost thereof, had been reflected in the profit and loss as we reviewed the books?

A. They had been reflected in the profit.

The Court: All right. If we reflected them again upon the theory of the defense, on the basis of 342 suits at \$25 rather than \$24.50, aren't we duplicating the situation?

A. No, we are saying that these purchases should have been increased. Nothing was ever put on the books to indicate the purchase of that \$8500 worth of merchandise.

The Court: Here on the books there—

A. —as an inventory item. An inventory item is something that you take an inventory. You count it and make a journal entry. It doesn't come through your cash record.

The Court: All right.

Mr. Shelton: But the transaction occurred in '44, Mr. [648] Accountaint. That is the crux of the matter, that these goods were actually bought in '44.

(Testimony of Roland D. Hellman.)

A. And they were a wholesale item, they were in the inventory.

Mr. Shelton: That is immaterial. It was——

A. He was not mixing them in his retail store.

Mr. Drewes: It is a proprietorship, your Honor. There is no distinction between his business and himself. He bought the suits.

The Court: They were bought in '44.

Mr. Drewes: They are in inventory in '44. They can't be anything else.

A. They weren't included at the end of the '44 inventory.

Mr. Shelton: It is a question of fact and not how the entries were made, and they were admittedly bought in '44.

Mr. Hagerty: That brings it back down to our original question, it is a question of credibility.

Mr. Drewes: No, it is not.

Mr. Hagerty: It is a question for the jury.

The Court: Bring the jury in and we will excuse them for the day. I think it is vital that we rationalize this matter. I still think the Government is correct in its contention here. You claim, Mr. Shelton, that it resolves itself into a matter of law.

Mr. Shelton: Yes, your Honor, we think it is a matter [649] of law that these goods were inventory even under the defendant's basis. Now our contention is we don't know whether the defendant's testimony is true or not. We think it may not be true, but assuming for the purposes of discussion that the defendant's testimony is true, we say as a

(Testimony of Roland D. Hellman.)

matter of law the suits that were in the basement at the close of '44 were part of his inventory as much as those upstairs, and inventory does not depend on whether it is recorded on the records. It is a matter of fact.

(The following proceedings were had in the presence of the jury:)

The Court: Ladies and gentlemen, it has reached an approximation of our usual adjournment hour at four o'clock, and I have agreed with counsel there is no purpose in keeping you here any longer. Counsel and Court have been going over some matters of law that pertain more or less to the Court's view rather than the jury's, and also I might advise the jury that by stipulation of counsel after we adjourn on Friday, tomorrow being Friday, we will run all day tomorrow, Friday, we will adjourn at four o'clock, and then we will not resume the case until the following Tuesday, leaving Monday free for the jury to attend to your own business and social matters. The case is running a little longer than we anticipated. It takes time in these matters.

Accordingly I will discharge the jury for the afternoon [650] and request you to return tomorrow at ten o'clock, with the same admonition, not to discuss the case nor form an opinion until the matter is submitted to you. You may now retire.

(The following proceedings were had outside the presence of the jury:)

(Testimony of Roland D. Hellman.)

The Court: Well, I think we have discussed this informally for the edification of the Court, and I assume that at the proper time the Government witness will take the stand and state the Government's theory in connection with this.

Mr. Drewes: He will.

The Court: At that juncture the matter will resolve itself into a matter of law or may prove to be a question to be submitted to the jury, which I will resolve after I hear all of the testimony.

Now, here is 12/31/44 merchandise inventory, \$85,011.26; 12/31/45, \$83,394.64; and 12/31/46, \$57,449.59. These figures were adopted from the inventory. When was the stipulation entered into, in point of time?

Mr. Drewes: Friday before the trial. Last Friday.

A. The inventory at the end of '44 only contained 102 sailor suits. I wanted to point that out to you, the inventory at the end of '44. That \$85,011.26 only included 102 sailor suits.

Mr. Shelton: Mr. Hellman, can you speak a little louder [651] so you can be heard?

The Court: He said at the end of 1944 the inventory only contained or referred to 102 sailor suits.

A. That's right.

The Court: Well, is it not a correct statement, counsel for the defendant, that if the Court allows this item to be considered by the jury as it now is posed before the Court, that it will impeach the

(Testimony of Roland D. Hellman.)

integrity of the items referred to in the stipulation?

Mr. Lewis: No. I do not think it does, your Honor. The witness testified he had not placed them in the inventory, that they were not merchantable goods as far as he was concerned. He was trying to dispose of them at wholesale.

The Court: Well, we come right down to Mr. Shelton's argument or the other gentleman, the consultant, the specialist, that you can't consider this man as having a dual personality from an accounting viewpoint. He can't be a Jekyll and Hyde, so to speak. [652]

Mr. Lewis: Well, your Honor, I believe that you can. Many merchants get undesirable merchandise and don't include it in their inventory; they are trying to return it. The testimony was he tried to get Levy to get Saraga to take it back. He wouldn't do it, and so he just put it aside. It is an item outside of his inventory. I was brought up in the merchandise business as a boy. In the first World War my father had run a store. My brother's still in business. Many a time you order stuff and there is an argument whether or not you are going to include it in inventory; until that is determined you do not include it in inventory, if you want to return the merchandise.

Mr. Shelton: Your Honor, I think that is entirely a red herring in this case. The defense contention is that this inventory had value. If it had no value, if it was zero value inventory, then in the usual system of inventory it would be inventoried

(Testimony of Roland D. Hellman.)

at zero, and my friend Mr. Lewis is again raising a red herring.

A. It would be inventoried at zero, but you would have taken the usual cost of \$8,500 on your books beforehand.

Mr. Shelton: In 1944, but not in 1945, Mr. Hellman.

Mr. Lewis: Well, as a matter of fact, it did not come out of the business account. It came out of his personal funds. [653]

Mr. Shelton: That again is immaterial, because the question is what assets of all kinds, both business and personal, did the defendant have as of 12/31/44. Whether it came initially from business or personal assets is immaterial. The question is, what assets did he have as of December 31, 1944?

A. The stipulation covered the investment per the books. This is material that was not in the books.

Mr. Shelton: The stipulation adopted the books, but it uses the term "inventory."

The Court: In the final analysis it decreases the profit \$8,550 as related.

Mr. Lewis: Well, your Honor, in the final analysis it does more than that, because when he received the \$5,000 from Mr. Lerman—what year was that?

A. 1945.

Mr. Lewis: —in 1945, and when he received the \$7,725 returned by check, they are saying that it is income in 1945 because it appears there.

Mr. Shelton: No, we are using the net worth

(Testimony of Roland D. Hellman.)

method, Mr. Lewis. We don't use these individual transactions, your Honor, to determine the income. We use the net worth method. And these Lerman checks and the testimony with respect to the Lerman checks was offered on wilfulness and is partial corroboration, but the Government's theory [654] of understatement of income is the net worth, and despite your basis——

Mr. Drewes: We don't admit that the Lerman transactions and the Saraga transactions concerned the Goodman suits. That is the defense's story.

Mr. Hagerty: Well, it all comes back to——

Mr. Drewes: Those were sales in '45, a year and a half after the record shows the Goodman suits were purchased.

Mr. Hagerty: So it is a matter of credibility again. It is a matter for the jury to resolve.

Mr. Shelton: Your Honor——

Mr. Drewes: Your Honor mentioned a moment ago that the effect is to understate profit. That is, of course, on Mr. Hellman's theory that they are picked up in '45 as purchases, whereas the record shows conclusively they were picked up in '44.

Mr. Shelton: And the record——

A. It picked up——

Mr. Drewes: They were purchased in '44.

Mr. Lewis: They were purchased in '44, but they were not picked up on the purchases of the—— on the books. They were purchased with his funds, separated from the business books, and they were held in suspense. That would have been a suspense

(Testimony of Roland D. Hellman.)

account, if he wasn't going to retail them, and he could have suspended it that way. I admit [655] that the proper way to have handled it would have been to have made a suspense account, non-useable goods or something else. But he didn't do that. And, as your Honor knows fully well, everybody doesn't know all these fancy rules of accounting. If he wasn't going to use those suits, he would naturally keep them out of his inventory until he had determined if he could dispose of them at wholesale.

Mr. Shelton: Your Honor, there is nothing fancy about this. It is just elementary that your inventory includes everything that you have got. It is immaterial whether it is all recorded or not. The inventory is for all that a man has got. Now if Mr. Olender had been carrying on a corporation, there might be some reason for separating personal assets and corporation assets, but here you have a man engaged in an individually owned business, operating only under a trade name, and there is no reason in God's earth to distinguish his personal assets from the business assets, and this is just an attempt by the defense to impeach the stipulation after Mr. Lewis has clearly stated he had no such intention.

A. How many books have you ever seen where your business assets and personal assets are combined?

Mr. Shelton: That is immaterial, Mr. Hellman.

(Testimony of Roland D. Hellman.)

The question is, it is a question of fact, and not how records are kept. [656]

Mr. Drewes: I tried such a case two weeks ago, U. S. against Port.

A. Where the assets were combined on the books, the personal assets?

Mr. Drewes: Yes.

A. A case where his personal assets were in excess of his business assets?

Mr. Drewes: I think we have stated our position, your Honor.

The Court: I think so.

Mr. Drewes: He had inventory or cash on hand in 1944. That is perfectly clear.

The Court: I have the thing pretty well in mind. All right, gentlemen.

This final item of \$7,725, it got into the capital account, did it, the Saraga item?

A. We didn't complete that.

The Court: We are up to that point, are we?

A. That's right.

The Court: All right.

Was it ever claimed in any of the conferences leading up to the stipulation, gentlemen, and the figures shown in the inventory for 1944, '45 and '46, that this precise item on the inventory in question referred to as 322 sailor suits referred to the Goodman transaction? [657]

Mr. Shelton: No, your Honor; it was never claimed. It came as a surprise to the Government

(Testimony of Roland D. Hellman.)

at the time of trial that this line of defense was adopted at all.

The Court: It was never claimed in conference? Never claimed at any of the conferences with the gentlemen for the defense?

Mr. Lewis: Your Honor, I think I made that claim to Mr. Shelton, not in these terms. I made the claim the \$20,550, that the Goodman checks were available to the defendant at the end of 1944. Now, we didn't go into the details of whether it was in inventory or not. Conferences were very brief on this matter, your Honor, because——

The Court: There must have been something relating to the stipulation, because it is a very formal——

Mr. Lewis: We just went down—they took the inventory all by the returns and these items, and wherever we agreed with them we did it largely for the convenience of witnesses, and this coming right off the books, we agreed to, but I certainly, because when I held my conference—I came into this case very late, and there were two sets of counsel before me in the matter, and as the year '45 was running out Mr. Shelton wasn't as courteous as usual and I got into the case for about ten days and he had set a conference date and I asked him to postpone it and he was kind enough to do it [658] for 24 hours, but he said he had to get along with it.

Mr. Shelton: Well, it was the year '44, your Honor, and the situation was that we had arranged a conference and held a conference with counsel

(Testimony of Roland D. Hellman.)

prior to Mr. Lewis and the other counsel came to the conferences, and I think Mr. Lewis knows, and said, "We are going to have to—we think we are going to have to get out of the case." So they got out of the case in the year '44, just as the year was about to run. The thing had run out quite a long time with the other counsel. I didn't mean not to be fully courteous as usual to Mr. Lewis, but that—just one more thing, Mr. Lewis—but in connection with the \$20,550, I think Mr. Lewis will bear me out that at the time the conference was held in our office consideration was also being given to the year 1944, and that his contention with respect to those checks was made with respect to the year '44 and as the cash item and not as an inventory item.

Mr. Lewis: That is correct, your Honor. I contended that as a net worth basis this \$20,550 was available to this man through all the year.

I didn't mean that you were not courteous. I meant that you had your reasons for not—for rushing it.

The Court: All right. We will adjourn for the day.

(Thereupon the adjournment was taken until 10 o'clock Friday, September 26, 1952.) [659]

Friday, September 26, 1952—10:00 A.M.

The Clerk: United States of America vs. Olender on trial.

Mr. Hagerty: At this time, may it please the Court, I have requested permission to put a short witness on out of order.

The Court: No objection?

Mr. Drewes: No objection.

Mr. Hagerty: Would you take the stand, Mr. Terrana?

MIKE TERRANA

called on behalf of the defendant; sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. My name is Mike Terrana.

Q. Spell your last name, please.

A. T-e-r-r-a-n-a.

Q. Your address? A. 1030 Broadway.

Q. San Francisco or Oakland?

A. Oakland.

Q. And your occupation?

A. Tailor. [660]

Direct Examination

By Mr. Hagerty:

Q. Mr. Terrana, you have said that you are a tailor in the City of Oakland? A. Yes.

Q. Where is your location?

A. 1030 Broadway, Oakland.

(Testimony of Mike Terrana.)

Q. 1030 Broadway. Is that in the same building as the Army & Navy Store? A. Yes.

Q. The store owned by the defendant, Mr. Olender? A. Yes.

Q. Do you know Mr. Olender? A. Yes.

Q. How long have you known him?

A. Oh, since 1942.

Q. 1942. Were you engaged in the tailor business at that time?

A. No, I was working for the old man, Bernstein, when I met him. He used to bring in work over there, a pair of pants, you know, or something, to be done, and that is where I met him.

Q. Directing your attention to the years 1945 and '46, were you engaged in tailoring work in Oakland? A. Yes.

Q. Did you have your own location? [661]

A. Yes.

Q. Where was that?

A. On 10th Street between Broadway and Franklin Street in Oakland.

Q. In the course of your operations did you make adjustments or alterations for service men in uniform? A. Yes.

Q. Did you ever work directly for Mr. Olender?

A. No, sir.

Q. Did you ever receive business from Mr. Olender's store? A. Yes.

Q. Would you describe the nature, the type of business that you received? A. Navy work.

Q. Describe it to the ladies and gentlemen.

(Testimony of Mike Terrana.)

A. I was doing alterations on Navy uniforms.

Q. Drawing upon your experience and the work you have done on Navy uniforms, what size would you say the average sailor is on the West Coast?

A. Oh, from 35 to 38.

Q. So most of your work then was adjusting or altering uniforms to fit that size man; is that true?

A. Yes.

Q. Now directing your attention to the year 1946, did you do much alteration work of that nature which originated from [662] the store of Mr. Olender?

A. I did quite a bit of his work, oversize.

Q. Would you describe to his Honor and the ladies and gentlemen of the jury the type of work you were doing then?

A. Well, the average sailor is a little guy and he had oversize, big size uniforms, so that—

Q. “He had”—you mean Mr. Olender?

A. Mr. Olender had big sizes, and he had a salesman over there, Big John. He say, “Mike, can you fix this guy?” I tell him, “Oh, well, get him in the dressing room. Put it on and I will see what I can do for them.”

Some of those kids are so anxious to have it done. So we cut it down to fit them.

Q. Do you know of your own knowledge whether there was a large demand for uniforms in the year 1946?

A. A large demand?

Q. Yes, was there a big demand?

A. For uniforms—yes, they couldn't be got.

(Testimony of Mike Terrana.)

They couldn't get them. Nobody could get any uniforms.

Q. Do you know why that was, I mean why the demand?

A. Well, all them kids were coming back from the war, tell everybody they wanted tailor-mades.

Q. In other words, when they returned from overseas they wanted a new uniform?

A. They wanted a new uniform. Everybody wanted [663] tailor-mades.

Q. They were all going home and they wanted to look neat?

A. They wanted to dress up neat.

Q. And as a result it was difficult to obtain supplies; is that right? A. Yes.

Q. At the present time where are you located?

A. 1030 Broadway.

Q. And that is the same building that the Army & Navy Store is in?

A. The same building, yes.

Q. Does Mr. Olender have a tailor in his business?

A. No, sir; he can't have a tailor in his business. Neither can I sell uniforms. I got it in the lease, black and white.

Q. In other words, the landlord does not permit the tenants to compete with each other?

A. That's right.

Mr. Hagerty: You may cross-examine.

Mr. Drewes: No questions.

The Witness: Thank you.

(Testimony of Mike Terrana.)

Mr. Hagerty: I might ask you one other question, Mr. Terrana. Were there other tailor shops in that vicinity during the years 1945 and '46?

A. Yes.

Q. Could you give us the names of some of them? [664]

A. Well, across the street from me was Navy Joe, and, oh, between Broadway and Washington there was Louie Klein, Tenth Street Cleaner—he was doing Navy work also, and Bernstein—he was in the same building as Mr. Olender, T. D. Tailor Shop. They were all in one block.

Mr. Hagerty: Thank you, Mr. Terrana. No other questions.

The Court: The witness is excused?

Mr. Drewes: He is excused.

The Court: You are excused.

(Witness excused.)

ROLAND D. HELLMAN

resumed the stand and, having been previously duly sworn, testified further as follows:

The Clerk: Mr. Hellman, would you please restate your name for the record?

A. Roland Hellman—H-e-l-l-m-a-n.

Direct Examination

(Resumed)

By Mr. Lewis:

Q. I hand you herewith, Mr. Hellman, the Defendant's Exhibits K, I, J, H and L, and U. S.

(Testimony of Roland D. Hellman.)

Exhibits 40, 40-A and B, also the United States Exhibit No. 41, which is the Saraga check for \$7725.

Have you your chart there before you?

A. Schedule 1? [665]

Q. Yes. A. Yes, I have Schedule 1.

Mr. Lewis: I think yesterday afternoon, your Honor, right before we recessed, we were at the point of the \$7725 check, and I would like to have Mr. Hellman trace—continue with the chart at the point where that check comes into it.

A. In the middle of Schedule 1 on the left side we find the item:

“Refund sent to M. Olender—November, 1945. Saraga unable to furnish merchandise ordered, \$7,000.”

That, of course, follows down from above, which we have covered the ground there, as this check having been received.

And we will go across the page to the right-hand side and find an item of \$725, which by referring above the total of \$725 we will start there with \$18,000 which has been shown was checks drawn by M. Olender, five checks, in the amount of \$3600 each made to Saraga.

Below that \$6500. Mr. Olender drew a check of \$6500 to Saraga.

He paid Mr. Saraga a total of \$24,500.

However, only \$23,775 worth of merchandise was shipped by Mr. Saraga to Mr. Olender.

(Testimony of Roland D. Hellman.)

\$23,775 we identified yesterday on the books as the [666] purchase.

The difference of \$725 was a refund due to Mr. Olender out of the \$24,500 that had been paid to Mr. Saraga.

Mr. Saraga combined this \$725, and we follow the arrows over to the left, combine the \$725 to the \$7,000 which had previously been given to Mr. Saraga for merchandise which he could not deliver. He therefore drew one check in the amount of \$7,725, dated November 15, 1945, to pay Mr. Olender the money due him for merchandise that he could not deliver. This check was endorsed "Army and Navy Store, by M. Olender," and given to Mr. Leavy to attempt to purchase more merchandise.

This check had never gone through Mr. Olender's bank account.

Following down—yesterday this \$7,725 check was pointed out on the books of Mr. Saraga, which is in U.S. Exhibit 40-B. We showed where that money was drawn to Mr. Saraga's bank account.

Now the next item below \$7,725, it appears again for the second time, the same amount. Now that was a check or proceeds thereof given to Saraga by Leavy for additional—this check that he gave to Mr. Saraga—and that is in Mr. Saraga's books. There is an item here on Mr. Saraga's books, page 50, of this "Cash receipts" showing an item on March 19, 1946, marked "Exchange account, [667] \$7,724."

I may explain, the \$7,725 check was reduced on

(Testimony of Roland D. Hellman.)

account of a bank collection charge. The bank had charged a dollar, and the amount was reduced by one dollar.

Now this exchange account general item, posted to such an account as that would be just as it indicates, exchange, that the merchandise—that for some reason it wasn't posted to a regular accounts receivable for the purpose of merchandise and it was just an exchange check, it was a reduction of the cash in Mr. Saraga's bank. So we describe that as "Check or proceeds thereof given to Saraga by Leavy for additional merchandise," and Saraga's books indicating receiving it.

Now this check, therefore, was not in the possession of Mr. Olender at the end of 1944.

Mr. Shelton: Objected to, if your Honor please; I believe there is no evidence in the record to support that, and if the witness has grounds for that statement I would ask that he set them forth.

The Court: Whatever basis you have, Mr. Witness, you might state.

A. Well, the check of \$7,725—let me correct myself first. I said this check was not in the hands at the end of '44. I meant the year '45. This check was drawn November 15, 1945, to the Army & Navy Store, which is identified as Mr. Olender's business. It was never deposited [668] in Mr. Olender's bank account and therefore it does not appear on his books.

Either this check was cashed and the proceeds of

(Testimony of Roland D. Hellman.)

either cash or this check itself was either in Mr. Olender's hands or Mr. Leavy's hands.

Mr. Shelton: If your Honor please, I would like to object and ask that that be stricken unless the witness has himself examined that check.

Have you examined the check, Mr. Hellman, about which you speak?

A. This check here?

Mr. Shelton: The check for \$7,725?

A. Yes, I have.

The Court: Does it have a clearing house endorsement on it?

A. Yes.

The Court: Does it appear to have been cashed?

A. No, it doesn't indicate that—

The Court: Are there any perforations through it at all?

A. Yes—they are not regular—there are some perforations, but it is not a regular cancelled stamp.

Mr. Lewis: If your Honor please, for the record, will you refer to the check by the U. S. Exhibit number?

The Court: You can determine whether it was cashed or [669] not?

Mr. Shelton: Exhibit 41. Your Honor, may I ask the witness if the bank stamp on the back does not show that that was cashed?

The Court: Yes.

A. This one here, you mean?

Q. (By Mr. Shelton): Yes. Doesn't one of the

(Testimony of Roland D. Hellman.)

stamps on the back indicate, Mr. Hellman, that that check was cashed?

A. It was cashed in Oakland, yes.

Mr. Lewis: I think the testimony was, your Honor, that the proceeds of that check was given to Mr. Leavy to get further merchandise, and then he later received——

The Court: Let us have it from the witness, please. One thing at a time.

A. There is an endorsement on the back. Actually the endorsement is Army & Navy Store, by M. Olender, pay to the order of any bank.

Mr. Shelton: So that indicates, Mr. Hellman, that the check was deposited, does it not?

A. Not deposited, no.

Mr. Shelton: Well, it was put through the bank, isn't that——

A. It was put through the bank.

Mr. Shelton: ——isn't that a form of deposit?

A. Not if it was cashed, it is not. [670]

Mr. Shelton: You are quibbling about language?

A. No, I am not quibbling about language, Mr. Shelton. A check can be deposited to a man's store account or it can be cashed and the proceeds can be put in his pocket or given to Mr. Leavy.

Mr. Drewes: Ask him if he knows.

Mr. Shelton: Do you know, Mr. Hellman, what was done with that check?

A. No, I don't. You can't tell from an endorsement on the check what was done unless it was actually cashed.

(Testimony of Roland D. Hellman.)

Mr. Shelton: Now, can you say, Mr. Hellman, it was not deposited?

A. I can, because I have checked Mr. Olender's bank deposits and no such item appears.

Mr. Shelton: If your Honor please, I would like to ask that that be stricken, for this reason: a check may be cashed and the proceeds made available without going through the books, and there is evidence in this case that——

The Court: There isn't any disagreement between your position and that of the witness, as I see it. I may be incorrect. The witness has stated that the check bears the bank endorsement, also bears the endorsement of the Army & Navy Store, by Mr. Olender.

A. That's right.

The Court: The check may have been handled in one or two [671] ways. It may have been taken to the paying teller at the bank upon which—what is the name of the bank, the drawee bank—the bank upon whom the check was drawn?

A. Corn Exchange Bank Trust Company, New York.

The Court: Or it may have been taken to the local bank. What is the name of the local bank?

A. The Bank of America, Oakland.

The Court: The Bank of America, Oakland.

A. The Bank of America, Oakland.

amount of \$7,725 or \$7,724, as it may appear—one dollar being an exchange deduction.

A. That was in a subsequent check.

(Testimony of Roland D. Hellman.)

The Court: Or it may have been deposited in the account. Now this gentleman says he examined the deposit account and it does not appear. The inference may be drawn that the defendant received it in cash and gave it to someone else.

A. Your Honor, if I might point out on this check for November 15th, 1945, which we are talking about and which Mr. Olender endorsed Army & Navy Store, and the proceeds that we are arguing about, whether it was cash or deposit, we have this check drawn by Saraga in June of '46——

Mr. Hagerty: Mr. Hellman, may I suggest that you use the Government exhibit number so we will know?

A. The check I was just speaking about was U. S. Exhibit 41. Now U. S. Exhibit 42, dated June 24, 1946, from Saraga [672] to Lewis Leavy, in the amount of \$7,724, described as repayment in full on advance made, that check was endorsed by Lewis Leavy, re-endorsed by Milton Olender, and that check was deposited in Mr. Olender's commercial bank account for the Army & Navy Store, and the symbols on the back are not the same as the time symbols if the check was cashed.

Q. (By Mr. Lewis): Assume, Mr. Hellman——

Mr. Shelton: Mr. Lewis, would you bear just a minute with me? I understand there may be some evidence in this exhibit bearing on that, if you would bear with me just a minute. We might be able to locate it here.

(Testimony of Roland D. Hellman.)

Mr. Hellman, will you state again the date of that check, if you please?

A. Are you looking for the deposit in Mr. Olender's bank account? On June 28, 1946, you will find a deposit of \$7,724.

Mr. Shelton: Go ahead, Mr. Lewis. I believe we can straighten this out later.

Q. (By Mr. Lewis): Assume the check \$7,725, U. S. Exhibit No. 41, was endorsed by Mr. Olender, the proceeds given to Mr. Leavy. Proceed now with your explanation.

A. We follow down on the left side again, Schedule 1, the second item from the bottom:

“Saraga again unable to deliver merchandise. Sent refund check to M. Olender. Deposited [673] to personal bank account April 5, 1946.”

Which appears in the duplicate copies of the deposits there that they are examining now, and this check was returned by the bank as uncollectible.

Following down, Saraga sent a new certified check to M. Olender, which we have here, U. S. Exhibit No. 42, which was also deposited in his personal account—excuse me, Mr. Shelton. I said that you will find that deposit in there. You will not. That is the commercial account. This \$7,725 went into Mr. Olender's personal bank account.

We can identify that going into his personal, not the store bank account. That is why this schedule is broken down on the left side, “Personal,” and the right side, “Store,” to show that of the original \$20,550 this amount, \$7,725, went back into Mr.

(Testimony of Roland D. Hellman.)

Olender's personal funds, keeping them separate, and the \$13,550, the balance, went into the store. That is why this schedule is divided into two parts, to help trace the personal and the store, which is the way he was handling this account.

Now to show where the \$725—even though that was part of the \$7,725 check, Mr. Olender reimbursed the store for \$725 because it was store money and not personal money.

Mr. Shelton: If your Honor please, I would like to ask to strike the statement that the thirteen thousand and some odd dollars went into the store account. I believe that what [674] the witness has done is to take the total of \$20,550, to subtract the \$7,725 which went into the personal account, and to assume that the remainder went into the store account through merchandise, on the ground that that is not in evidence and that this is an expert testifying only from facts otherwise in evidence. I would like to ask that be stricken.

The Court: That may go out.

Mr. Lewis: I think, your Honor, Mr. Shelton is in error because the \$5,000 of the Lerman transaction is deposited into the store bank account June the 19th, 1945, and the additional investment credited to M. Olender's capital account on the books. You will find that.

Mr. Shelton: If your Honor please, I think Mr. Lewis is starting one step too late. We do not believe that the evidence of the defense has tied in the \$5,000 Lerman item with the original Goodman

(Testimony of Roland D. Hellman.)

transactions involved in the \$20,550, and, in any event, Mr. Hellman testified about a considerably larger amount, thirteen thousand plus.

Mr. Lewis: That is the \$8,550—

The Court: I struck the testimony of the witness with respect to the \$13,550 as an inference not borne out by anything in the record, and accordingly was stricken from the record.

As to the \$5,000 item, we passed that point. [675] Five thousand was credited to capital. However, whether it be the same five thousand emanating from the Lerman transaction, it is a matter of argument.

You may proceed. Counsel, may I suggest to you to proceed with the witness, and the interchange of arguments from time to time are not very helpful. This is not reflecting on you, Mr. Lewis, nor Mr. Shelton, but if we can proceed, let the Government take its position at the proper time on cross-examination unless there be objections before the Court. But with counsel wrangling about these items, it will not be very helpful to us. As a matter of fact, it is rather confusing as we go along.

Mr. Lewis: I appreciate that, your Honor.

The Court: I am not reflecting on you, Mr. Lewis. I am just trying to organize.

Mr. Lewis: I understand.

The Court: Now we are at the \$7,725 item, aren't we?

A. I was referring to Mr. Olender's general journal, U. S. Exhibit J, or Government's Exhibit

(Testimony of Roland D. Hellman.)

—or Exhibit J under date of November 30, 1945, entries made on Mr. Olender's books, a debit to cash—that is a debit for cash received, and a bank charge of one dollar as a debit, and a credit to accounts payable, explained as a refund from Saraga's account, suits not delivered, miscellaneous account.

So the credit was made to accounts payable. [676]

Previously when the \$24,500 worth of checks had been drawn they had been debited to accounts payable, and inasmuch as he received only \$23,775 with the merchandise, that is the only amount of credit that was set up.

Therefore the accounts payable were out of balance by \$725, and it was necessary to make this credit entry to accounts payable so that the Saraga accounts payable was balanced off at zero.

The Court: Who made that entry?

A. The \$725?

The Court: No, who made that journal entry there, the bookkeeper?

A. It is my understanding—Mr. Olender testified that he made no entries in these books, and so it must be presumed the bookkeeper made the entry.

The Court: Who was the bookkeeper at that time?

A. Just from hearing it in Court, it was Vera——

The Defendant: Vera Manger.

The Court: Did you ever talk to her?

A. No, I have never seen her.

(Testimony of Roland D. Hellman.)

The Court: You never interviewed her?

A. No.

Following the last item on Schedule 2, the left side, Saraga sent new certified check to M. Olender, which was also deposited in his personal bank account on June 28, 1946. [677]

Now we show—we have the check itself, U. S. Exhibit 42 in evidence, but this check was received by Milton Olender and marked “Paid,” cleared through the Bank of America, Oakland, on June 29th, 1946, the day after it was deposited.

That can be shown as going into his personal bank account, if it is necessary. I don't have the——

The Court: That did finally find its way into his personal bank account?

A. That was deposited in the personal bank account. As a matter of fact, it went in twice, in April, and the check was returned as uncollectible, and it went back in June.

The Court: When the certified check came in?

A. When the certified check came through, that's right.

Q. (By Mr. Lewis): Now, Mr. Hellman, will you take Defendant's Exhibit N, the inventories, and I want to ask you one or two questions on that. Take the year 1944 and go to the sailor suit item of inventory. Do you find it?

A. You mean January 1st, 1945, the same as December 31, 1944?

(Testimony of Roland D. Hellman.)

Q. Well, that's the——

A. The end of the year '44?

Q. Yes. A. Yes.

Q. What are the total number of sailor suits shown on that [678] inventory on hand?

A. There are four items described on here, one for 105 sailor suits at \$23, making a total of \$2,415.

The Court: Just a moment. 105 at \$23?

A. That's right. Total \$2,415.

The Court: That appears under——

A. 105 sailor suits.

The Court: What is the legend in the inventory?

A. It is under "miscellaneous items, sailor suits"——

The Court: Miscellaneous items. All right.

A. ——on page—it was page—it is page 45 of his inventory.

The Court: 45.

A. There are three individual types of suits described here. One marine suit, blue, at \$28; one gray suit gabardine at \$29.50, and one gray suit sheeno at \$10.75.

The Court: We are concerned with sailor suits.

A. That's right.

The Court: The item of \$23.

A. That's right, making a total sailor suit inventory at the end of 1944 of \$2,483.25.

Q. (By Mr. Lewis): Now, will you do the same thing with the inventory for the next year? It is dated January the 1st, 1946, and applies to the end of the year 1945.

(Testimony of Roland D. Hellman.)

A. That's right. That appears under "miscellaneous items, [679] basement No. 1." No page number on the inventory. "322 sailor suits \$7,889."

The Court: That is the extension, \$7,889?

A. That is the extension. Later in pencil was put the figures \$24.50—at \$24.50 each.

The Court: That is the price?

A. Price, and there is a notation "75 upstairs." Presumably indicating the store floor room.

Below that also in pencil—written above that it says "End of B-1"—apparently Basement 1—which it refers to the top of the inventory sheet.

Following that are listed—not immediately following, but down at the bottom of the page, and also in pencil on the left side, an item marked "main floor" and are listed more sailor suits. There are 39 sailor suits at \$24.50.

The Court: On the main floor?

A. That's right.

The Court: 39?

A. 39 serge suits at \$24.50.

The Court: \$24.50?

A. \$955.50.

The Court: All right.

A. 19 gabardine suits——

The Court: Well, gabardine hasn't anything to do with the sailor suits. [680]

A. Yes, it's a type of suit. It's a suit—. Well, I can't testify to that. Whether the gabardine is a sailor suit or a military suit of some sort.

Q. (By Mr. Lewis): Well, will you give us the

(Testimony of Roland D. Hellman.)

total inventory and leave out the gabardine suits?

The Court: I thought we were concerned with the sailor suits.

A. We are.

Mr. Lewis: I say leave out the gabardines.

The Court: We have enough to deal with, plenty to deal with the sailor suits without taking in the gabardines.

A. May I explain, your Honor, why the comparison is being made?

The Court: I would like to——

A. To show that at the end of 19—the inventories at the end of the three years in question here, the end of '45 the inventory is in excess in dollar amount in '45—four times the amount of any other year. Not quite four times 44. In numbers the inventory is three and a half times in excess of the end of '45 than at the end of '44 or '46. Thus under the circumstances making it apparent that there must be some unusual items in this December 31, 1945, inventory to make it so high.

Mr. Drewes: Move to strike that as a conclusion.

The Court: You are drawing instances merely from the arithmetical figures? [681]

A. You do that——

The Court: Without foundation in the record, isn't that true?

A. Except——

The Court: Will you answer that, please? Is that true or not?

A. Drawing an inference?

The Court: Yes.

A. From a mathematical——

(Testimony of Roland D. Hellman.)

The Court: Based upon the arithmetical figures before you?

A. That's right, yes.

The Court: Without any foundation, isn't that true?

A. Other than on testimony presented by Mr. Olender.

The Court: Did you examine the invoice registers for 1944, 1945 and 1946 to determine the number of sailor suits purchased?

A. In totals?

The Court: Yes.

A. No, I didn't. The register——

The Court: Are they available?

A. The invoice registers?

Mr. Lewis: Yes.

The Court: They are available?

A. They are right here. Purchase register. [682]

The Court: Did you examine the invoices themselves?

A. No, sir.

The Court: Are they available?

A. I believe they are, yes, sir. Would you like us to compute the total suits?

The Court: Well, I think at some place in this record, in order to clarify the situation—it is not altogether clear in my mind, and I take it if it isn't clear in my mind it isn't clear in the jury's mind——

Mr. Lewis: If your Honor please——

The Court: Will you pardon me just a moment. I have this thought in mind. It may be adaptable. It may not be.

(Testimony of Roland D. Hellman.)

Mr. Lewis: Yes.

The Court: This thought I have in mind that between the government accountants and the defense counsel, the defendant's accountants, that you take the invoices of the sailor suits purchased in 1944, '45, '46, as reflected by the books and the sales as reflected by the books. For this reason, as it stands now in the record, and if I am incorrect I should like to be corrected, we have 322 sailor suits in 1946 inventory——

A. January 1st, 1946.

The Court: ——January 1st, 1946. 75 marked "upstairs" at an invoice price of \$24.50 and the extension is \$7,889. A. That's correct.

The Court: Thus far in the record the only basis for the [683] assumption or the inference that these 322 sailor suits relate to the Goodman transaction is the testimony of the defendant himself.

Mr. Lewis: That's correct.

Mr. Haggerty: That is true.

The Court: As I view the record.

Mr. Lewis: That's correct.

The Court: Mr. — the government counsel, Mr. Shelton and his colleague, takes the position that the introduction of that figure is one made by the defendant in order to meet a condition confronting him. Hereafter the question of credibility might arise for the jury to determine.

Mr. Lewis: Yes.

The Court: Now it seems to me that in aid of a clarification of the situation the court might direct,

(Testimony of Roland D. Hellman.)

if the records are available, that an analysis be made of the purchases of sailor suits from all sources. That would include Goodman, Serrano—

Mr. Haggerty: Seagoing?

The Court: Whatever trade names there are. Total them, total the sales made in the period 1945, and as a result of that we have a breakdown of the total figures and we can then draw inferences favorably or unfavorably with respect to the introduction of the 322 suits.

Mr. Lewis: Yes, sir. [684]

Mr. Shelton: If your Honor please, I would like to point out one thing in that connection.

The Court: Yes, sir.

Mr. Shelton: Not in any argumentative sense, but it is our understanding of the record that in this case that when suits were brought upstairs and sold the totals would not go into the sales register as such; in other words, they would just go in as cash items, and the information worked up may be defective in that respect, in that sales are not properly accounted for.

The Court: In other words, I am directing on the part of the court that a little interim audit be made, if it hasn't already been made, to aid the court and the jury in a solution of the problem. The matter goes to credibility. The defendant takes the position, he apparently took the inventory—that is, the defendant—that these 322 suits came from Goodman or came out of the Goodman transaction.

Mr. Lewis: That's correct.

(Testimony of Roland D. Hellman.)

The Court: Now with that situation confronting the Court and the jury, I think it fair that the defense, as well as the prosecution, engage in a rationalization of all of the purchases as to sailor suits and the sales, if the records be available. If they are not available, then to report to the Court.

Mr. Lewis: I think they are available, your Honor. [685]

The Court: All right. Breaking purchases down from a standpoint of individuals, that is, Goodman and so forth, and breaking them also down as to the individual purchases made as distinguished from the store purchases.

Mr. Lewis: That's right. I think that will greatly clarify the matter.

The Court: The defendant took the position that after the Goodman purchases he dealt with them individually. That is your position on the record thus far?

Mr. Lewis: That's correct.

The Court: I still maintain the same breakdown.

Mr. Lewis: Yes.

The Court: All right.

Mr. Lewis: Mr. Hellman, assuming that the analysis of the Goodman transactions as set forth on our schedules 1 and 2 here is correct, what is the effect on the net worth of the defendant for 1944 and 1945?

Mr. Shelton: If your Honor please——

The Court: What was that question? Read it, Mr. Reporter.

(Testimony of Roland D. Hellman.)

(Question read by the reporter.)

Mr. Shelton: If your Honor please, if this is designed to elicit—it is a vague question, as some of Mr. Lewis' have been.

The Court: What is that? [686]

Mr. Shelton: If it is designed to elicit a contention that inventory as of the close of the year 1944 was higher than that stipulated to in the stipulation between the parties, the government would object on that ground.

The Court: Is that the intention, Mr. Lewis?

Mr. Lewis: That is the intention.

Mr. Shelton: And in accordance with the position of the government previously stated to the Court, we object to that on two grounds; first, that the stipulation is binding on the parties, and, secondly, that Mr. Lewis stated previously to the Court that he did not intend to impeach the stipulation as to the inventory figures in the case, and on that double ground the government will object to this question.

Mr. Lewis: Your Honor, I think the question is admissible because on our contention we have, as you have stated, two accounts here, the Army and Navy Store and the defendant's personal funds, and we make the assumption that the Goodman transactions during the year 1944 as reflected by the \$20,550 taken from the box as shown in the transcript, page 389, in January, 1944, was not a store transaction, it was from personal funds. The goods were not taken into the store at all until 1945.

(Testimony of Roland D. Hellman.)

Mr. Shelton: I believe, your Honor—

The Court: No matter how you approach the inventory figures, it is not my position to disturb the stipulated [687] figures. I think the stipulated figures were entered into after mature consideration on the part of counsel representing both sides. I will permit testimony with respect to any errors, palpable accounting errors that may have crept in.

Thus far they haven't appeared to me yet. At least in my mind the question of the Goodman sailor suits, as identified in the present inventory, represent a constant figure, whatever it may be, the inventory values reflected there, whether it be at the beginning of '45 or at the end of '45 or '44.

Now you take the position, Mr. Lewis, as I understand you, that you predicate a hypothetical question to this witness—

Mr. Lewis: Yes.

The Court: Repeat the question.

Mr. Lewis: Assume that the Goodman transactions as set forth in our chart, and that the \$20,550 which was testified was taken from the safe deposit box and purchased cashier's checks and given to me for the purpose of getting sailor suits, and not taken out of the store account, and that those sailor suits, 322 suits that wound up in the inventory, the 342 suits that Mr. Olender testified he said he took into the stock of the company, 20 suits were sold, and that the \$7,000 given to Mr. Leavy—or the 280 suits sold by Mr. Leavy for Mr. Olender were not taken into the inventory, but the proceeds

(Testimony of Roland D. Hellman.)

turned over to Mr. Leavy for additional merchandise; and assume that those suits were not sold at a profit; and that in the year 1945 Mr. [688] Olender again gave to Mr. Leavy a total of \$7,725; and assume that the 200 suits sold at cost to Mr. Lerman was added to the investment account of Mr. Olender in the store. I then ask him what effect—and also assume that the \$24,500 payment made by Olender resulted in \$23,775 worth of merchandise which was entered into the inventory, and a refund of \$725 made to the store and put through the books of the store. I now ask him the question: What effect that would have on the net worth of Mr. Olender on December 31, 1944, and December 31, 1945.

Mr. Shelton: It is our understanding of the law, if the Court please, that a hypothetical question must be based on facts in evidence. It can be based on either party's theory but it must have evidence to support each of the constituent parts.

The government feels in this case that Mr. Lewis' hypothetical question—that a number of the parts are not supported by the evidence in the record, that it is an attempt to impeach the stipulation. And on those grounds we object to the question.

Mr. Lewis: I think, your Honor, that the question is correct in the present state of the record. I think Mr. Olender and Mr. Leavy's testimony was that Leavy sold 200 suits at cost for Olender to Lerman. The endorsements on the cashier's checks show that Olender endorsed the check which was made to Leavy. Leavy testified he gave him

(Testimony of Roland D. Hellman.)

that money. And the only [689] remaining problem is what we are going to do with this inventory situation.

Mr. Shelton: If your Honor please, I believe it is clear from the defendant's testimony that his version is that these Goodman suits with the \$20,550 were received in the early part of 1945—certainly before June.

Now at that time that became inventory. If it remained inventory at the end of the year, then it is a part of the inventory like any other, and the defense is not entitled to impeach the stipulation.

If it was converted from inventory into cash, one of two things would have happened to it. Either it would have gone into the defendant's records, his bank accounts, either business or personal, or into other assets and be accounted for in that way, or else it would have gone into personal funds of the defendant.

Now your Honor will recall that the Government has already offered evidence in this case that the defendant gave Mr. Ringo a \$50,000 cash figure for his undeposited cash as of December 31, 1944. The Government therefore strongly feels that this \$20,550 had to be converted into other assets, that the defense's hypothesis on which this question is asked is clearly unsound and not supported by the evidence, and we therefore renew our objection to the question.

Mr. Hagerty: Our position, your Honor, is again it is [690] credibility. Every bit of the evi-

(Testimony of Roland D. Hellman.)

dence, every bit of the substance of that hypothetical question has been sworn to on the stand by the defendant and the witness Leavy and substantiated by various of the Government's exhibits in reference to these checks. We feel that Mr. Shelton is merely arguing on the basis of the evidence. That is a matter to be taken up in argument.

Mr. Drewes: On the contrary, your Honor, as has been stated heretofore there can be no question that the suits were purchased in 1944. In that year they were either inventory or converted into other assets, possibly back into the vault in the form of cash. Therefore any effort——

The Court: Those are matters of inference to be drawn from the record.

Mr. Lewis: Your Honor, I might suggest——

The Court: We have a transaction—. Approaching it now objectively from the Court's viewpoint, the transaction partakes of two phases. According to the defendant's testimony, he swore under oath, he states he held the merchandise, the sailor suits, for a period of time; that they were not the right size; that he sold 200 suits at cost. Well, that was a wash transaction, according to your theory.

Mr. Lewis: That is right.

The Court: There was no profit. It washed itself out.

Mr. Lewis: That is right. [691]

The Court: Then for some reason which the defendant claims was a good reason, he transferred

(Testimony of Roland D. Hellman.)

or included in the inventory 322 suits in the inventory.

Mr. Shelton: At the end of '45.

The Court: At the end of '45. Whether it be '44 or '45. Now up to this very moment and throughout all stages of our analysis of the evidence there is not one bit of evidence in the books that would correlate the 322 suits to the transaction affecting this Goodman or the Goodman Company. Thus far I do not know and I would have to guess, save and except for the defendant's testimony, that 322 suits came from Goodman. Therefore I believe it vital that we have a breakdown to determine the complete analysis of all the sailor suits, No. 1. That is what I suggested this morning. And, secondly, you ask this Court in the face of the evidence thus far elicited to change or impeach the stipulation.

Now, may I have the stipulation, please?

The merchandise inventory: 12-31, 1944, \$85,011.26.

12-31, 1945, \$83,394.64.

12-31-46, \$57,449.59.

Now those figures were collated from the inventories which have been in evidence.

Mr. Lewis: That is correct.

The Court: Those inventories were prepared by the defendant. [692]

Mr. Lewis: That is right.

The Court: And the Government has accepted those figures and they are now in the stipulation.

(Testimony of Roland D. Hellman.)

Mr. Shelton: They appear on the tax returns, if your Honor please.

The Court: And they appear on the returns.

Mr. Lewis: Now, your Honor, I call your attention to the preliminary paragraph of the stipulation about going into sources.

The Court: "Each party shall have the right to show the sources involved in items in this stipulation."

Mr. Shelton: If your Honor please, changing the figures in the inventory, it seems clearly the defense purpose is not explaining sources. There is a difference between explaining sources as the source of cash and in varying the terms of the figure. What the defense is trying to do here, as I understand them, and they haven't indicated otherwise in this colloquy, is to change the figures and to add additional starting inventories as of the beginning of the year '45.

Mr. Hagerty: No, if your Honor please, at the end of that hypothetical question was: Would this make a difference in the net worth? And the net worth is composed of various things besides the inventory, and it involved the putting into the capital of this amount of cash. That is over and above the inventory. [693]

Mr. Shelton: In that case it would show up as cash or other assets, if your Honor please, and I think it also must be deduced from the defendant's own testimony that he does not contend that it was converted to anything else. His unsupported story

(Testimony of Roland D. Hellman.)

is that he put it down in his basement. He didn't include it in the inventory. The defendant didn't tell the story that the defense counsel are now trying to argue, that this might have changed into cash or it might have changed into other assets.

The Court: Well, part of the proceeds went into capital account.

Mr. Shelton: Well, maybe part, but that was in——

The Court: \$5,000 went into capital account.

Mr. Shelton: That was in '45, I think, your Honor, and I was addressing myself, your Honor, to the end of '44. What they are trying to do here is to increase the defendant's assets at the end of '44 and thus cut income, and I submit that the defendant's testimony does not support the defense counsel contention that as of the end of '44, which seems to be the crucial time on this issue, that the Goodman suits had been converted into other assets.

The Court: Well, is or is not that a factual problem for the Jury or is it a matter of law for the Court?

Mr. Shelton: We think it is a matter of law, your Honor, on the defendant's own story. You take the defendant's [694] own story and apply the rules of law to it, and it seems to the Government that on the rules of law which are applicable on the defendant's own story they are not entitled to increase the inventory as of the end of '44 contrary to the stipulation.

Mr. Hagerty: We feel it is a definite conflict

(Testimony of Roland D. Hellman.)

and a question of fact, your Honor. It is a matter of the credibility to the jury.

The Court: Well, the Jury may retire for the morning recess. The same admonition, ladies and gentlemen, not to discuss the case under any circumstances, nor to discuss the case or form an opinion until it is submitted to you.

(The following proceedings were had out of the presence of the Jury:)

The Court: What is your position on this matter, the net worth at the end of '44 would be increased by \$20,550?

A. The net worth at the end of '44 would be increased by \$20,550. In other words, all of those items, the \$5,000, would have been—

The Court: \$5,000—when you speak of five thousand, tell me what the five thousand is. Is it the five that went into the capital account?

A. That's right.

The Court: I can't, you know—after all we are dealing in figures here. When you speak of five thousand, there are several five thousands in the record. Five thousand [695] in capital account. All right.

A. That came in in '45. Therefore it was probably—or it was merchandise at the end of '44.

The Court: You say “probably.” What do you mean “probably?”

A. Well, the fact that the money went in in June of '45 doesn't indicate when the merchandise was sold.

(Testimony of Roland D. Hellman.)

Mr. Shelton: You mean June of '44, don't you, Mr. Hellman?

A. No, I don't. June of '45. That was the Lerman transaction. The \$7,000 on the 280 suits——

The Court: \$7,000 on the 280—where is it?

A. On the left side there, up a little higher.

The Court: Well, that just washed out one the other.

A. No, that merchandise, the proceeds from that were in the hands of Leavy. They are not included in Mr. Olender's net worth as presented by the Government at the end of '44.

The Court: After you consider the breakdown of all—starting with the top \$7,000, the 280 suits sold by Leavy to Olender——

A. That's right, that is the same \$7,000 all the way down.

The Court: It breaks itself right down, and the net result is \$7,725 which ultimately appears to have been cashed by the defendant?

A. And deposited in his personal bank [696] account?

The Court: Well, that does not reflect itself——

A. On the store books, no.

The Court: On the store books.

A. Therefore, it is an additional asset the Government never considered in its net worth statement.

Mr. Shelton: Your Honor, that is not supported. We offered evidence, the defendant's own statement, of cash. We rely on that.

(Testimony of Roland D. Hellman.)

A. This \$7,725 was in the form of funds in the possession of Leavy during the end of 1944.

The Court: Where do you trace that?

A. Into his personal account.

The Court: Would you show me that?

A. The \$7,725?

Q. Yes. A. Yes.

The Court: You say you have it in his books in his personal account?

A. He does not have books for his personal account. We have his personal bank statements that show the deposits in his personal bank statements.

The Court: All right. Now we have \$12,725. Where is the balance of this?

A. The balance is \$8,550.

The Court: \$8,550? [697]

A. You see, if your Honor will—that \$20,550 in the upper lefthand side there, where it starts to break three ways, those three items, the \$5,000, the \$8,550—

The Court: \$5,000 is a wash transaction?

A. That is part of the \$20,550. It is a wash transaction but it affects the net worth at the end of '44. Inasmuch as the money was paid to Goodman in the early part of '44 and the proceeds were not received by Olender until '45, therefore that money or the merchandise had to be somewhere at the end of '44, either in cash or in merchandise. It is an additional asset that is not on the books or not on the net worth statement as presented by the Government.

(Testimony of Roland D. Hellman.)

Mr. Shelton: But, Mr. Hellman, you overlook the lack in the proof that these are the same transactions. Leavy did not testify that he had this \$5,000 at the end of '44. There is no testimony from him in the record.

A. I said it would be merchandise or cash.

Mr. Shelton: I know, but the inference I think is that Leavy would have had it. Another problem in this situation, if your Honor please, is that there is no attempt to even on the defense's theory to say what part of the suits which were on hand in their inventory were sold in '44 and what part were sold in '45. The defendant's story, as I understand it, he had suits in the basement, but he doesn't know how many. [698]

Now, if these suits were sold in '44, which there is strong reason to believe, because of the scarcity of merchandise, then if they were, then they weren't sold in '45.

Mr. Lewis: Your Honor, on the Lerman transaction, I don't think there is much doubt about when they were sold. The Government Exhibit No. 34, cashier's checks, 34 and 5, the cashier's check dated May 14th, 1945, and endorsed by Leavy and Olender—

Mr. Hagerty: And endorsed—

Mr. Lewis: —the Army & Navy Store.

The Court: That would increase the net worth, according to your theory, in the amount of \$20,000.

A. \$20,550.

The Court: \$20,550 in cash or in kind?

(Testimony of Roland D. Hellman.)

A. Cash or kind, yes. The inventory sheets here do not reflect that at the end of '44. Therefore—that there was no such items of merchandise. Therefore they could not be in the store books.

The Court: \$5,000 in the capital account——

A. \$5,000 that didn't go into capital until '45.

The Court: I can't conceive, counsel, that this becomes a matter of law for the Court, as these men pose this question to me, whether you consider it adroitly presented or otherwise.

Mr. Shelton: If your Honor please—— [699]

The Court: I am fearful that in trusting the matter to me as a matter of law you may be placing the Court in the position wherein, if I did rule, that these matters may be regarded as a matter of law, that I would be in error.

Mr. Shelton: If your Honor please, as I understood the defendant's testimony, he testified that these sailor suits were received, that they were in large sizes, they were unmerchandisable, they were put down in his basement.

The Court: That's right.

Mr. Shelton: Isn't the whole inference from that then, since we are outside the presence of the jury I can talk frankly——

The Court: Certainly, that is why I excused the jury.

Mr. Shelton: Isn't the whole inference of that that the whole thing was on hand as of December 31, 1944, if his story is true—which the Government—I can say again since we are not in the presence of the jury—which the Government doubts.

(Testimony of Roland D. Hellman.)

The Court: That is true. Here is a man on trial. He is entitled to present to the jury any theory he chooses which may aid his defense. I cannot foreclose him from presenting any matter nor could the Government nor could the defense counsel. He is entitled to do that.

Now he gets on this witness stand. I may not believe him. You may not believe him. I may believe him. As I say, [700] the question of credibility is involved. And he states that out of cash he bought the merchandise from Goodman. A certain number was sold. Finally included the 322 suits on the inventory from the Goodman transaction.

Now, one, if the 322 suits in the inventory were not part of the Goodman transaction, then there is no reason to change or alter any figures concerning net worth or otherwise, because the 322 suits were already considered in the purchases and the sales and the ordinary routine affairs.

A. The purchases, no, they were not included.

The Court: Counsel—I mean, Mr. Witness—if the 322 suits which, according to Mr. Shelton, were seized upon by this defendant to form a very happy coincidence to afford the defendant an opportunity to throw the Goodman transaction into the records, that is what Shelton—Mr. Shelton contends. He just says that the defendant picked the 322 suits out of the blue. His colleague earlier said in the case: He is pulling himself up by the bootstraps, with respect to the 322.

(Testimony of Roland D. Hellman.)

Now, that may be true, from their viewpoint. I am looking at it from the viewpoint of the Court. You are looking at it from the viewpoint of the accountant.

If the 322 suits are not part of the Goodman transaction, they were part of the details of the routine affairs of his business at the Army & Navy Store. Were they not, in the [701] inventory? Weren't they?

A. I didn't quite follow the end there.

Mr. Haggerty: That would be right, your Honor.

The Court: Isn't that natural? Certainly it follows as the night the day.

Mr. Lewis: Yes.

The Court: And if it follows as the night the day, if the 322 suits are not part of the Goodman transaction, there is no occasion to alter any record.

Mr. Lewis: That's right.

Mr. Haggerty: That's right.

The Court: Either inventory records, net worth records or cost of merchandise records.

Mr. Lewis: That's right.

The Court: Isn't that true?

Mr. Haggerty: That's right.

Mr. Lewis: That is correct.

The Court: All right. But if you believe the defendant's testimony that the 322 suits are part and parcel of the Goodman transaction, then you do alter net worth?

Mr. Lewis: That is correct.

Mr. Haggerty: That's right.

(Testimony of Roland D. Hellman.)

The Court: Now, that inevitably is the logic of your position?

Mr. Lewis: That is right. [702]

Mr. Hagerty: That's the disputed——

The Court: I don't care how you approach it, whether you say 44 at the end or the beginning, that is the logical disposition.

Mr. Lewis: That's right.

Mr. Shelton: Your Honor, clients speak through counsel, and in this case——

The Court: Now I may not believe the defendant, I may. I don't know. After a very thorough searching cross-examination you may find that the defendant seized upon it. Well, after collating the facts and orienting yourself to every phase of the case you may say that the defendant was, in the vernacular, playing cozy with the Goodman transaction, that he had a lot of cash stashed away. Now, let's speak in the vernacular, and this cash that he had stashed away he wanted to get rid of, and he had an opportunity with a very fast sale of merchandise. The merchandise in the sale, these sailor suits, was a fast moving commodity, he could sell in terms of 200, a hundred block suits. That he invested that cash, which was a little, in the vernacular again, a little warm, he invested that cash in the suits. He found that he couldn't dispose of them readily. He had to take them into the inventory. That is according to his theory.

Now, some of the jurors may believe that, that

(Testimony of Roland D. Hellman.)

he did have that cash, that he wanted to get rid of, he wanted to [703] get it into circulation.

But I can't foreclose the defendant from testifying that the 322 suits are part and parcel of the Goodman transaction. That is his testimony under oath, and he swore to tell the truth in this courtroom.

You gentlemen present to me your theory. I may or may not believe it. The defendant has the right to argue from the facts. This is a criminal trial. This is not a court trial. We have a jury. If we did not have a jury, I might cut this thing down very, very rapidly.

Mr. Shelton: If your Honor please——

The Court: Yes, sir.

Mr. Shelton: Clients operate through counsel.

The Court: Yes, sir.

Mr. Shelton: Your Honor was present here at the session this week after the end of the jury session when Mr. Lewis stated specifically that the defense did not intend to impeach the inventories and the Government accepted that statement.

The Court: Yes.

Mr. Shelton: The Government accepted that and believed that would be the case and I respectfully submit to your Honor that the purport of this question which is addressed here is to back up on the position which long after the start of the trial Mr. Lewis took in open court. [704]

Mr. Lewis: Your Honor——

The Court: No, there is just—. I have given

(Testimony of Roland D. Hellman.)

thought overnight to this problem, because it is a severe problem, it is a very, very grave problem underlying this case. It affects the rights of the defendant before me, it affects the right of the Government, and I gave serious thought to it. If the defendant is correct in his testimony and if he took the 322 suits out of the basement and included them in the inventory, and if they be out of the Goodman transaction, these 322 suits, then you haven't any corresponding entry in the books of account that would take the 322 suits into the books. Therefore, you have to revise and alter the books to the extent that you had a cost of that merchandise. Isn't that true? A. That is true.

The Court: And if you had a cost of the merchandise, you have a corresponding differential in the figures that are before the Court, isn't that true? A. That's right.

The Court: That is the way I approach it.

Mr. Hagerty: That is exactly it.

The Court: Because the 322 suits couldn't fly into that inventory. They did fly into the inventory, according to the defendant. I don't know.

Mr. Hagerty: That position was somewhat taken by [705] Government counsel in cross-examining the defendant: Why didn't you put it in that way?

The Court: It seems to me that—. In the course of the investigation the Government no doubt interviewed the bookkeeper who undertook to register these journal entries. It seems to me that the defendant at the time that he introduced these items

(Testimony of Roland D. Hellman.)

of sailor suits in the amount of 322 into the inventory must have had some conversations with the bookkeeper. It seems to me that with his background of training and his background of training not only in the college but in after years in book-keeping that he certainly knew he could not take those 322 suits without some corresponding entry in the books—although those matters may be gone into at some other stage.

Mr. Shelton: One other thing—

The Court: But looking at it purely and simply as a matter of logic, apart from the hypertechnics of the accounting aspect, as a matter of logic you have to have a corresponding entry, and if you do you are going to alter the figures. Now the question posed before me is not a matter of law, as I view it. I say that respectfully, Mr. Shelton, and likewise, counsel, not a matter of law, and if I ruled on it as a matter of law I would be promptly reversed, and I don't intend to get reversed—not if I can avoid it. [706]

Therefore, I will permit counsel to elicit from this witness—. Now I wish you would pose the hypothetical question a little more accurately, without reflecting—I think you have introduced some matters here whether or not the introduction of the Goodman transaction would affect the net worth and how it would affect it and break it down. Then it becomes a question of credibility. Ultimately you will argue to this jury, the Government will argue the Goodman transaction didn't have any place in

(Testimony of Roland D. Hellman.)

it, it is a figment of the defendant's imagination, and so forth, and that it is a defense gimmick. The defense counsel will argue contrarily. So you have a sharp conflict.

(Short recess taken.) [707]

(The following proceedings were had in the presence of the jury:)

The Court: You may proceed, counsel, in the light of our discussion and colloquy in the absence of the jury.

ROLAND D. HELLMAN

resumed the stand, and, having been previously duly sworn, testified further as follows:

Direct Examination

(Resumed)

Mr. Lewis: If your Honor please, I think that I will re-word that question over the noon recess and try to make it a little clearer.

The Court: I wish you would.

Q. (By Mr. Lewis): Now, Mr. Hellman, I am showing you defendant's Exhibit W and defendant's Exhibit Z, and I would like for you to trace these items through the books of the defendant, that is, the Barney invoices. Will you describe those for the benefit of the jury?

Mr. Drewes: If your Honor please, may I interrupt here? You will recall that at the time the offer was made I pointed out to your Honor there

(Testimony of Roland D. Hellman.)

were two letters attached to those invoices. I wonder if they might be removed.

The Court: Do you have any objection to that?

Mr. Hagerty: No.

Mr. Lewis: No objection whatsoever.

The Court: I read them. I can't recall the contents. [708] They may be removed. This is for identification, in any event. They haven't been marked in evidence.

Mr. Lewis: They haven't been marked, your Honor.

The Court: You merely want to refresh his recollection, do you?

Mr. Lewis: No. They were marked for identification so that this witness could identify the transaction through the books.

The Court: You might remove the letters.

Mr. Drewes: I understand. We have no objection. Just take the letters out and put them aside.

A. Exhibit W is a purchase invoice from Barney's Clothes Shop, Los Angeles, in the amount of \$2111.67. It is dated October 30, 1944.

There is also an invoice dated November 30, 1944, in the amount of \$248.26.

Exhibit Z, two checks, cashier's checks drawn on the Bank of America, Oakland, one of them dated November 9, 1944, in the amount of \$1911.77 is to Barney's Clothes Shop, endorsed by Barney's Clothes Shop, and cleared through the bank in Los Angeles on November 15, it appears.

The other check is dated December 12, 1944,

(Testimony of Roland D. Hellman.)

cashier's check on the Bank of America in the amount of \$248.26, endorsed by Barney's Clothes Shop, deposited on December 20, 1944. [709]

These items appear on Mr. Olender's books under Exhibit I—that's the purchase register—under date of October 30, 1944, purchase of \$1911.77, and another purchase on November 30, in the amount of \$248.26.

I might correct myself. When I read this invoice, the first one that I referred to, as to the total of \$2111.67, that figure was as stated on the invoice, but the adding machine tape of the items on this page only total \$1911.77, an error of \$200 in addition. The actual amount of the check is for \$1911.77.

These were entered in Mr. Olender's books under purchases under the dates of October 30th and November 30th, with charges to purchases and expense, and a credit to accounts payable, that is, a liability of Mr. Olender to make this payment.

Now, as testified by Mr. Olender, these cashier's checks were purchased from cash funds, not from store funds. Therefore the invoices had been recorded on the books as a purchase and the amounts owing had been recorded.

As evidenced by these checks, they were paid for 1944. However, the books indicate that he owed this money at the end of '44.

In February of 1945 an entry is made in the general journal of Mr. Olender's books under date of February 28th—that is in the general journal, Ex-

(Testimony of Roland D. Hellman.)

hibit J—charging— [710] reducing accounts payable by total of \$6803.02, and crediting Mr. Olender's capital account, the investment account, for \$6903.02, with an explanation, "To record cash payments covering purchases from Money Back Smith and Barney's Clothes Shop."

Now, that was further posted to the general ledger as a separate—that was combined with other—under date February 28th, 1945, in accounts payable sheet of general ledger there is a charge to accounts payable of \$6903.02, which is posted from the general journal figure which I just read to you.

The credit to Mr. Olender's capital account was also posted in February.

There is an item appearing in the capital investment account of February 28th, 1945, coming from general journal 17 of \$6903.02.

The effect of that was, the books stated that at the end of 1944 Mr. Olender owed this amount of money. Yet we have shown on the Barney transaction, which is part of the \$6903.02, that that amount in fact had been paid by Mr. Olender with personal funds and therefore in February the store, February, '45, the bookkeeper made an entry crediting his capital account and reducing the accounts payable which had been erroneously set up at the end of '44. [711]

Q. (By Mr. Lewis): Now, will you trace through the Smith transactions? There has been testimony—

The Court: When you say it was erroneously set up in 1944, have you had the benefit of any con-

(Testimony of Roland D. Hellman.)

versations with the bookkeeper who made those entries?

A. No, sir. But they are made in the books as of 1944.

The Court: There is nothing erroneous about the entry. The entry is there. I mean, that is merely your supposition, the erroneous entry. The account is there in the books. Finally it was journaled out in '45 in the light of some conversations no doubt the defendant had.

A. The fact that it was set up as an accounts payable, when in fact the cashier's checks evidenced that the merchandise was paid for, it is erroneous to show it as being an account payable.

The Court: It is erroneous from your present viewpoint, looking at the books objectively, with all of the facts presently before you, and with the cashier's checks before you, but looking at it from a standpoint of the bookkeeper who was then engaged in preparing the books of account and keeping the books of account, it may then have been an accurate entry, isn't that true? If the bookkeeper did not know that Mr. Olender had paid for the items as a result of cash which finally found its way into cashier's checks at that time, the entry may have been a correct one [712] from her viewpoint, isn't that correct?

A. That's right, if she had no knowledge of the bills being paid for by cash.

Mr. Shelton: If your Honor please, may we get one thing clarified, too, in connection with your

(Testimony of Roland D. Hellman.)

Honor's question? Mr. Hellman has testified that as to the Barney items, the cashier's checks are the evidence of payment. Now, the \$6903.02 item also included Money Back Smith adjustment——

A. That's right.

Q. Did it not?

A. Mr. Lewis just asked me to explain it, yes.

Mr. Shelton: Now, on what basis—on what basis did you assume that payment had been made of the Money Back Smith items, Mr. Hellman?

A. The original entry in Mr. Olender's books, general journal 17, under date of February 28, which I just read. I will repeat. The debit was to accounts payable \$6903.02 The credit was to M. Olender investment. The explanation of that journal entry is to record cash payments covering purchases for Money Back Smith and Barney's Clothes Shop. That is taken from Mr. Olender's original books which were kept by his [713] bookkeeper.

Mr. Shelton: But there is this difference in the two items. As to the Barney's items, you have the supporting evidence of the cashier's checks which are in evidence. You have no similar supporting evidence to those cashier's checks with respect to Money Back Smith items, do you?

A. The Money Back Smith items was evidence in testimony by Mr.—the gentleman that appeared here.

Mr. Lewis: Lorenzen.

A. Lorenzen, yes, the other day.

(Testimony of Roland D. Hellman.)

Mr. Shelton: Your Honor, I ask that that be stricken on the ground that the testimony of Mr. Lorenzen, as will be seen, is very vague and indefinite and does not tie in to this particular testimony of this witness.

Mr. Hagerty: If your Honor please, I would suggest—I ask your Honor to strike counsel's remarks and ask him not to be arguing these questions before the jury.

The Court: Yes. The statement may be stricken. You might proceed and then you can cross-examine on these aspects as you go along.

A. Referring back to—do you want me to proceed with Money Back Smith?

The Court: Yes.

Mr. Lewis: Yes.

A. Referring back to Exhibit I, Purchase Register, Mr. Olender, page 22, under date of 1944, February 8th, an item [714] of \$750 for purchases. There is also \$22.95 for freight, making total accounts payable \$772.95.

Under date of February 3, \$425 for purchases, \$25 accounts payable—debit and credit.

February 2, Money Back Smith, \$1035 purchases, \$13.57 freight, \$1048.57, credit to accounts payable.

February 24, \$950.33 purchases, \$950.33 accounts payable.

February 24, \$657 purchases, \$13.22 freight, \$679.31 accounts payable.

March 15, \$468.88 purchases, \$11.77 freight, \$480

(Testimony of Roland D. Hellman.)

—correction. \$11.70 freight, \$480.58 accounts payable.

March 8, \$318 purchases, \$318 accounts payable.

March 2, \$68.25 purchases, the same amount, \$68.25.

Those items add up to a total \$4742.99, which, when added to the Barney purchases of \$2160.03, make a total of \$6903.02, which I just identified as being credited to Mr. Olender's capital account in February of 1945.

These Money Back Smith purchases were posted from the purchases register into the accounts payable in the general register. They are part of the total shown on this page, of \$14,452.24 of credits to accounts payable, and that item is posted in the accounts payable record as being owing at the end of 1944.

Q. (By Mr. Lewis): Now, assuming—

Mr. Drewes: If your Honor please, might that testimony [715] with respect to Money Back Smith go into the record subject to a motion to strike?

The Court: Yes, subject to a motion to strike.

Q. (By Mr. Lewis): Now, assuming that the evidence supports the payments by cash, Mr. Olender, not from the store, for the Barney items and the Money Back Smith items, what is the amount of the overstatement of the accounts payable as of December 31, 1944?

A. It would be \$6903.02.

Q. What effect would that overstatement of ac-

(Testimony of Roland D. Hellman.)

counts payable have on the net worth of the defendant as of December 31, 1944?

A. At the end of 1944 it would increase his net worth by crediting him with the cash that had been used to pay for this merchandise.

Q. What amount?

A. \$6903.02. Did you also ask me for the effect—just the year '44 or '45?

Q. What effect would that then have in net worth method on the year 1945?

A. By increasing the net worth at the end of 1944, under the net worth method, there would be a decrease in the net income as computed on net worth method on the year 1945?

Q. I am showing the thousand dollar check, Defendant's Exhibit G, that it was testified here earlier was drawn on December 23, the Army and Navy Store, 1944, and deposited in [716] personal bank account January the 10th, 1945, and was referred to as an outstanding check during that period. What effect does that check have on the net worth of the defendant as of December 31, 1944?

Mr. Shelton: If the Court please, could it be made clear that these questions are hypothetically based on the defendant's theory? I think Mr. Lewis is stating them more as facts.

Mr. Lewis: Assume those facts are true. They are in the record.

All these questions of this nature here, your

(Testimony of Roland D. Hellman.)

Honor, naturally are hypothetical. We have to assume——

The Court: This is the check that was cashed January 10, 19——

Mr. Lewis: 1945.

The Court: ——1945 and assertedly held by the defendant in his pocket over the interval of time?

Mr. Lewis: Yes. That is the check.

The Court: All right.

Q. (By Mr. Lewis): Assume those facts, what effect would that have on the defendant's net worth as of 1944?

A. It would increase his net worth at the end of 1944 by \$1,000.00.

Q. I will show you Defendant's Exhibit "X" for identification. What would be the effect for 1945 on the defendant's [717] income on the net worth basis, of the check for \$1,000.00, Defendant's Exhibit G?

A. It would reduce the net income on a net worth basis for the year 1945 by \$1,000.00.

Q. I have shown you Defendant's Exhibit there——what letter is that? A. "X."

Q. "X." Will you——

A. Is this an exhibit or marked for identification?

Q. It is marked for identification. Now, I want you to take that invoice and show how it shows in the defendant's books.

A. The first item appearing——

Mr. Lewis: Your Honor, this is an explanatory

(Testimony of Roland D. Hellman.)

invoice. Pardon me, just a moment, Mr. Hellman.

This is an explanatory invoice. Earlier in the trial you were asking how the defendant could identify the invoices and connect it up with the payments as shown on these books, and that is an invoice of many types from one store, and I want him to show how the defendant's book would show that as an accounts payable.

Mr. Drewes: May I have that explanation again?

The Court: You are using this as an example.

Mr. Lewis: To show the procedure.

The Court: I understand.

Mr. Lewis: It has no particular bearing on the case, [718] but your Honor asked me that question.

Mr. Drewes: Well, the question was asked of the defendant as to how he could identify his specific purchases?

Mr. Lewis: How they were shown, specific purchases were shown on the books. He said there could be no identification where the company he was dealing with sold numerous items, although the total amount of the invoice would show on the books, and that is the purpose of that exhibit.

Mr. Drewes: Was that question directed toward the books or toward the defendant's knowledge?

Mr. Lewis: No, it is a clarification of the book-keeping system of the defendant.

A. In Defendant's Exhibit I, Purchase Register, Page 58, under date of October, 1946, there is an item under date of October 1st, Western Military

(Testimony of Roland D. Hellman.)

Supply Company, freight 39 cents, merchandise purchases, \$44.30, accounts payable \$44.69, for which is this first invoice of Western Military Supply dated October 1, 1946.

The second invoice is for \$12.28, which is reflected on the books as \$12.00 purchases, 28 cents freight, accounts payable, to Western Military Supply, \$12.28.

The third invoice dated October 2, 1946, in the amount of \$106.80, identified on the books under date October 2, \$101.40 purchases, \$5.40 freight, total amount payable \$106.80. [719]

The fourth invoice under date of October 3, 1946, \$24.26, identified on the books as purchases, \$24.00, freight \$.26. Total accounts payable to Western Military Supply, \$24.26.

The next invoice from Western Military Supply under date of October 9th, total \$44.78, identified on the books, \$44.40 and \$.38 freight, \$44.78, accounts payable to Western Military Supply.

October 10, 1946, total invoice \$29.08, identified in the books as \$28.80 purchases, \$.28 freight, \$29.08 accounts payable to Western Military Supply.

The next invoice, No. 17782, on October 11, 1946—incidentally, these invoices bear numbers. They are printed, stamped numbers of the Western Military Supply Company. \$21.48, identified in Mr. Olender's books as \$21.20 purchases, \$.28 for freight, a total of \$21.48.

Western Military Supply Invoice 17803 under date of October 14, 1946—

(Testimony of Roland D. Hellman.)

The Court: Do you think you have gone through enough of these now?

Mr. Lewis: Yes, I think we have.

The Court: We will take the noon recess, ladies and gentlemen. The same admonition to you not to discuss the case or form an opinion.

We will resume at 2:00 o'clock.

Mr. Drewes: May I address the Court briefly after the [720] jury goes out?

The Court: You may retire. There are matters to take up.

Mr. Lewis: I would like to offer Defendant's W——

The Court: Do it at 2:00 o'clock. The jury is on its way out.

(The following proceedings outside the presence of the jury:)

Mr. Drewes: If your Honor please, in connection with the information the Court requested, an analysis of purchases, inventories, Mr. Mytinger has suggested to me that there are some very serious difficulties involved and that possibly the matter might be clarified. As the record already shows the record of sales, I take it, accumulative figure, taken either daily and then posted to the records, and also the records of purchases are apparently incomplete. As illustrative of that, your Honor may recall at some time early in the trial I asked counsel if they would look and see if they could find some invoices from the Goodman sales agency. The jury

(Testimony of Roland D. Hellman.)

not being here, I will show these to your Honor. (Handing photostats of Goodman Sales Agency invoices to the Court.)

The Court: The reason that I am prone to suggest it is, I think in fairness to both sides of this controversy, because during the course of your cross-examination you asked a very specific significant question. As I recall, you had in your hands an invoice, or a photostatic copy of an invoice [721] and asked the defendant on the stand, "Isn't it a fact"—and I think the invoice covered 100 odd suits, sailor suits—"isn't it a fact that the 322 suits shown in the inventory came as a result of the purchase shown by this invoice? Do you recall that question?"

Mr. Drewes: A prior purchase from a similar source, because there was a date difference.

The Court: Do you recall that question?

Mr. Drewes: Yes, I do. The price was the same.

The Court: The price was the same.

Mr. Drewes: Yes, that is the cost to him.

The Court: No, of course if the records are not available, there is nothing I can do about it. But it seems to me that the defense has kept some of these invoices——

Mr. Drewes: Well, the defendant has testified he has no invoices from the Goodman Company, your Honor, and those you have up there, your Honor, came out of the file of the Goodman investigation, which was a separate, entirely separate matter.

(Testimony of Roland D. Hellman.)

The Court: Let me try to think this thing out a little bit. The Government has had an opportunity to give two or three or four years to make this investigation, I assume rather intensively. I assume they have collated, collected, marshalled all of the facts necessary in the preparation of an orderly case. Customarily that is the situation as I view it. Likewise I assume the defense are prepared. [722]

Now, if my suggestion is non-productive or would not bear any evidentiary fruit, would not help us solve our problem, and I seeking to find a solution, then, of course, I will withdraw my suggestion.

Mr. Drewes: It was the opinion——

The Court: Such suggestion was not made in regard to the Government's side of the case or the defendant's side of the case. I try to sit here in somewhat of a non-partisan attitude, and I am trying to think of the jury, and in a jury case I try to refine the facts for the jury. That is all I can say.

Mr. Lewis: Well, your Honor, it doesn't matter to us if they want to go through all those invoices with us, we will do it. If they don't, that's up to them.

Mr. Drewes: That isn't quite how the problem arose, Mr. Lewis.

The Court: I think we are all trying to be helpful, as helpful as people could be, one representing the Government, one representing the defendant. But from the Government's view point, in light of the prior investigation, in light of the questions

(Testimony of Roland D. Hellman.)

they posed to various witnesses, I don't know the extent of the investigation, certainly, but if it is not a suggestion that is productive, I will withdraw it. I only said in the light of simplifying the matter.

Mr. Shelton: Your Honor, I might say one thing that will [723] clarify our position a little bit. We think many of these suits may have been sold off the floor through the cash register, and if that is true, there would be no separate record of those sales. They will just appear in the cash register totals, and it is for that reason that the Government in part feel that the analysis of purchases without being able to trace the sales, might not get us ahead far.

The Court: Apart from the matter of sales, I assume the government went over the purchase invoices very carefully, did they?

Mr. Shelton: They were certainly made available to the government agent, your Honor. I may say that in a net worth and expenditure case, when the Government has established proof that it believes justifies that method, it is a less careful examination of the purchase and sales records than where specific items of unreported income are charged.

The Court: I understand that, but there is no contention on the part of the government that the defendant destroyed any purchase records, is there?

Mr. Shelton: We don't know.

Mr. Drewes: We don't know.

Mr. Shelton: Operating in the black market as

(Testimony of Roland D. Hellman.)

we believe he did, that was a customary occurrence.

The Court: Well, the case will go to the jury, then, on 322 suits according to the Government's adequately stated [724] view thus far, and according to the defendant's, stated from your viewpoint, the 20 suits differential rest in the realm of uncertainty, in the limbo of uncertainty, some place lying around, and there it is.

Mr. Shelton: One other point, if your Honor please, with respect to Mr. Lewis' hypothetical questions and other similar questions, in the absence of the jury, we would just like to have the record show we have a running exception in the event of any possible cross appeal, and we won't renew our objections in open court.

The Court: That will be noted.

On your last item you renew your motion to strike with respect to the increase or asserted net increase of net worth in the amount of \$6,900.

A. \$6,903.02.

The Court: \$6,903.02.

Mr. Drewes: Your Honor, may I request and qualify that with respect to—with particularity to the Money Back Smith transactions, which are something less than that \$6,000.00 figure.

Mr. Shelton: Your Honor will recall that ties in with the Lorenzen testimony.

The Court: Yes.

Mr. Lewis: Your Honor, I thought we stated here the other day that the exceptions would be noted on all the objections. [725]

The Court: That is correct.

(Testimony of Roland D. Hellman.)

Mr. Lewis: Without the necessity of stating the exception.

The Court: Taking that transaction, that \$6,903 transaction which assertedly increases the net worth and in turn decreases the net profit for the year in question, correspondingly in the following year, isn't it conversely true?

A. That disappears in 1945 and it does not appear on the net worth at the end of '45. Therefore it wouldn't increase—'46, I should say.

The Court: Well, here let us take—you have the books of account and the books of account fail to reflect an actuality. The actuality was that the accounts payable in question had been paid out of cash. The bookkeeper apparently either did not know it or was not instructed to make a corresponding journal entry, journaling that out of the situation, crediting his capital account and debiting the other account as it may appear.

Are you gentlemen satisfied that that would increase the net worth at that time?

Mr. Shelton: It doesn't affect the year '46, if your Honor please. By increasing the assets at the beginning of '44—'45—the net—— [726]

The Court: Isn't it washed out in the very nature of things, one year against the other?

Mr. Shelton: No, sir, because it affects the beginning of '44, not the end. In other words, if a man has \$10,000 at the beginning of the year and \$20,000 at the end, and then you increase his begin-

(Testimony of Roland D. Hellman.)

ning \$2,000 and don't change his end, you have cut the income in that year from \$10,000 to \$8,000.

The Court: Well, are you satisfied that this item as it is now explained increased net worth at that time?

Mr. Shelton: It increased the net worth at the starting point on their theory.

The Court: All right. Are there any other items of cash payment, out of pocket payment, that would affect the accounts payable?

A. Accounts payable? No. Your Honor, when they say the invoices have been lacking, are they? We have available, I think, the invoices for '45 and '6.

Mr. Lewis: Oh, yes.

A. As they show——

The Court: Let me ask this question. Apart from the cash transactions made out of pocket or out of cash funds or out of evolved funds, or out of the safe deposit box funds, when he paid a bill, an invoice, did he mark on the invoice "Check No., paid," and so forth, as is usually done? Giving the check number or some corresponding number? [727]

A. Well, these were paid in total, like, for example—Yes, he had a card control for, like, Western Military, he kept a regular little card of all of his purchases, and accumulating his total purchases, he then would pay them monthly and write a check and make the entry on the card that the account was paid.

(Testimony of Roland D. Hellman.)

His bookkeeping system wasn't—it was kind of a mixture of—it wasn't a regular system, that is, the type of system that you find——

The Court: As the record now stands, gentlemen, the request I made is withdrawn, or do you desire to collate the invoices from the purchase side?

Mr. Shelton: Would your Honor give us a minute, please?

The Court: Yes.

(Discussion off the record.)

Mr. Drewes: An analysis of purchases would be helpful. We will undertake to make that. The reason I brought the question up, as I understand it, the Court wished the information for the purposes of clarifying the problem——

The Court: The court and the jury.

Mr. Drewes: And I simply want to point out, there were certain definite limitations to preparing a conclusive statement from an overall picture.

The Court: In what manner was the sales tax register maintained? How was that handled? [728]

A. For payment of sales tax?

The Court: Yes.

A. I have never seen a sales tax return. In normal procedure it would be to take the sales as reported by the books and compute the sales tags on that basis.

The Court: Off the register, or how?

A. Well, the sales were recorded from the regis-

(Testimony of Roland D. Hellman.)

ter readings, in the cash deposits, in the bank, and therefore that would be the figure that would be in the books.

The Court: For instance, I am "X"—I am a sailor. I go into the Army and Navy Store to buy a sailor suit and I pay cash.

From your examination of the books of account, as you have engaged, how would my transaction, that of ex-sailor, be reflected in the books? I give you \$35.00 for the suit.

A. Through the total sales rung up.

The Court: Tell me, I am in the store. Now, how is it handled, according to your view of the books?

A. And the testimony?

The Court: And the testimony thus far.

A. The sale would be rung up on the register.

The Court: Yes.

A. At the end of the day the total reading from the register would be taken.

The Court: There weren't going to be any hand memoranda [729] made or little memoranda tag, or anything?

A. Not unless I thought in the event that he was making this over to refunds to the sailors, any sales that they—they can't alter the suits properly, and if the sailor can't make a proper alteration and brought the suit back,——

The Court: Either from the Government's viewpoint or from the investigation made by the accountants, Mr. Shelton, was it determined at any time that the defendant kept the usual little sales

(Testimony of Roland D. Hellman.)

tags that you find in large and small businesses?

Mr. Drewes: What is the answer, Mr. Root?

Mr. Root: No.

Mr. Shelton: Do you want to come up here, Mr. Root?

Mr. Root: My understanding is that there weren't even any tapes, that the total on the cash register represented the sales figure for the day. It is my understanding that I received at the beginning of my audit. There may have been tapes which weren't available. At least the tapes weren't available. [730]

The Court: So the consequential result of that is that you would not be able to collate for the Court and the jury the details going to make up sales of any given commodity, be they blue sailor suits or hairpins, isn't that right?

A. No, not specific. You could do it on a mathematical basis. You could try to work it on a mathematical basis by taking the purchases and taking the sailor suits out of the purchases and determining the ratio of gross profit. That will give you an idea.

The Court: Where is the bookkeeper who kept these books during the course? Is he or she available?

The Defendant: May I answer?

The Court: Yes.

The Defendant: She lives in Oakland in one of the outlying districts there.

The Court: At least from an evidentiary viewpoint the total purchases reflected by the books from

(Testimony of Roland D. Hellman.)

the invoices of sailor suits will have some evidentiary quantum of value because the suggestion was made, I think by counsel, that the inventory at the end of a given period was increased.

Mr. Lewis: That's right.

The Court: And I think objectively, at least looking at the matter now, that we may rationalize from the invoices.

Mr. Drewes: Your Honor, would the Court consider——

The Court: It may be perfectly apparent to you, [731] gentlemen, that this is not an easy case for a jury. I think you will say that without——

Mr. Drewes: I shouldn't hesitate.

The Court: There should be unanimity of viewpoint.

Mr. Lewis: I have devoted enough thought to think out a way to present it so that an untrained person could understand it. I agree, your Honor.

Mr. Hagerty: Sometimes it overwhelms the attorneys in the case.

The Court: Never you, Mr. Hagerty. Some attorneys perhaps.

Mr. Drewes: If your Honor please, would the Court consider calling the defendant's bookkeeper as a Court witness, subject to cross-examination by both parties?

Mr. Hagerty: Well, we will see if we can get her.

The Court: As I view the case now, if I were trying it as the Court, apart from the jury sitting

(Testimony of Roland D. Hellman.)

here, I would make certain directions, that I wanted certain evidence and certain testimony. However, I am not going to make a suggestion in a jury case. It is a matter for the Government or the defense to present. It isn't my province to intrude myself in the trial of the case. I try, and sometimes fail, to engage dispassionately and earnestly and fairly in the trial of these jury cases, and now in my eagerness to bring to the forefront the facts, I may fail, I may show some [732] partisanship. I try not to. In my final explanation to the jury I will indicate to the jury that any suggestions I have made, any examination I have engaged in is not to be directed in favor of or against either party to the cause, but possibly to aid the jury.

Now this is not an easy case for a jury. As a matter of fact, I would consider the last case I tried, Mr. Shelton, as an easier case to present to the jury than this case, curiously enough. I think it was an easier case. Because in there you had eight, ten or twelve specific instances of asserted misconduct and in this case you are dealing with the so-called Goodman transaction almost in its entirety as the basis for misconduct on the part of this defendant.

Isn't that correct?

Mr. Shelton: That is correct, your Honor.

The Court: And that being so, and in surrounding the Goodman transaction with all of the tests and ascertaining the truth, there are not as many avenues of approach available as perhaps there were

(Testimony of Roland D. Hellman.)

on the Chin Lim Mow case, and yet in the Chin Lim Mow case we were dealing with Chinese books of account.

(Thereupon an adjournment was taken until two o'clock p.m., this date.) [733]

September 26, 1952—2:00 P.M.

(The following proceedings were had in the presence of the jury:)

ROLAND D. HELLMAN

resumed the stand, and having been previously duly sworn, testified further as follows:

Direct Examination
(Resumed)

Mr. Lewis: Your Honor, at this time I want to introduce into evidence the Barney's Clothes Shop order, defendant's W for identification, and the cashier's check, defendant's No. Z for identification.

Q. Assuming in the year 1944 the defendant purchased and received from Goodman 822 suits at \$25 each and the total of \$20,550 paid represented personal cash funds taken from his safe deposit box and that the sailor suits were ultimately disposed of as follows:

1. 200 suits in 1945 sold through Leavy to Lerman for \$5,000.

2. 280 suits in 1945 sold through Leavy for \$7,000. The proceeds remaining in Leavy's hands until

(Testimony of Roland D. Hellman.)

turned over to Saraga in August, 1945, as shown in Saraga's books.

3. 342 suits of an aggregate cost of \$8,550 transferred into the stock of the Army & Navy Store, 20 suits being sold through the course of trade, and 322 suits being [734] included in the store inventory as of December 31, 1945.

Assuming further that the original purchase of the 822 suits from Goodman was not entered in the books of the Army & Navy Store as inventory before December 31, 1944, and that the \$5,000 proceeds from the sale to Lerman was entered on the books of the Army & Navy Store as capital investment, the money having been deposited in the store bank account.

Assume further that the \$7,000 proceeds from sales by Leavy were returned to Mr. Olender in 1945, augmented by \$725 as represented by U. S. Exhibit 41, and as set forth in Schedule 1 of the survey that we passed out, which sum of \$7,725 defendant turned over to Leavy for transmission to Saraga in 1945.

Assume further that the sum of \$7,725 had not been returned to the defendant until 1946 and was then deposited in his personal bank account.

Based upon the foregoing assumptions, what is the effect of the Goodman transactions upon the defendant's net worth at the end of 1944 and 1945, respectively?

A. Based upon the assumptions in your question, the effect of the Goodman transaction in the

(Testimony of Roland D. Hellman.)

net worth of Mr. Olender is as follows: In addition to the assets listed in the net worth computation made by the Government, Mr. Olender had an asset as of December 31, 1944, of \$20,550, [735] which asset consisted of 822 sailor suits in the basement, which were segregated and not included in the store inventory as of December 31, 1944, as shown by Exhibit N. That asset was not taken into account by the Government in their list of assets shown by the net worth statement.

The Court: As of what time, Mr. Witness, \$20,550—as of what time?

A. December 31, 1944. As of December 31, 1945, the net worth would have been \$7,725 more due to at that time the Saraga check being in the possession of Leavy, at the end of '45. The net effect of that on an income basis, net worth income basis, is that comparing on the Government's schedule is to reduce income in 1945 by \$12,825 and reducing the net income in 1946 by \$7,725.

Mr. Lewis: At this time, your Honor, I had prepared a simple form of net worth statement which I would like to pass out to the jury, and I have provided the Government with a copy of it two days ago, as an explanatory matter, your Honor.

The Court: This is an admixture of fact and law?

Mr. Lewis: It is just an example, an example of a simple net worth statement showing the factors if all the facts were known and were simple.

The Court: I see. Does the Government have

(Testimony of Roland D. Hellman.)

any objection to this? I haven't been able to read it thoroughly. [736] I just glanced at it.

Mr. Drewes: What is this that counsel is referring to?

Mr. Lewis: This is an illustration of a net worth statement. I thought it might clarify——

The Court: This is merely——

Mr. Lewis: It is in simple form.

The Court: This is merely for the purpose of illustration, is it, counsel?

Mr. Lewis: That is right.

The Court: Well, subject to any correction the Government may note herein, I would see no objection to using it as an illustrative matter. The Court will instruct the jury hereafter as to net worth. Yes, I think it is fairly accurate just from glancing at it.

Mr. Lewis: I think it is accurate, your Honor. I just thought it might clarify it for the jury, if the jury could look over it.

The Court: I say "fairly accurate." You say "accurate." I say "fairly accurate" because I have had two minutes to read it. You have probably been working on it overnight. So I still say, "fairly accurate."

Mr. Lewis: Your Honor, has your Honor ruled on the admission in evidence of those exhibits?

The Court: This is not the subject of admissibility in evidence. You may—— [737]

Mr. Lewis: No, I mean on the defendant's W and Z, the exhibits which I offered a moment ago.

(Testimony of Roland D. Hellman.)

The Court: Is there any objection?

Mr. Drewes: No objection.

The Court: All right, they may be marked.

The Clerk: Defendant's Exhibits W and Z heretofore marked for identification now in evidence.

(Thereupon documents referred to, previously marked defendant's Exhibits W and Z for identification, were received in [738] evidence.)

Q. (By Mr. Lewis): And now, Mr. Hellman, will you explain as simply as possibly the illustration of net worth in the net worth statement that has been presented to the jury? Just follow the schedules down as you are reading it.

A. I will read through this illustration, if you have it in your hands, giving an illustration of net worth and net worth statement.

"Net worth is simply defined as the excess of all assets, such as cash, money in banks, real estate, bonds, et cetera, over the liabilities or obligations owing.

"Assets less liabilities equal net worth."

The formula for that is,—“A minus L equals NW.”

“The average business person construes this to mean the values of assets based on current market values. However, from an accounting viewpoint—”

The Court: Read a little slower.

A. “However, from an accounting viewpoint the

(Testimony of Roland D. Hellman.)

values would be based on actual cost. As a simple illustration of the difference, suppose you owned at December 31, 1951, the following.”

This schedule shows cost basis and market value. We read down the list:

Item, a home with cost of \$10,000, market value \$15,000.

Furniture, \$2,000; market value, what you could sell it for, is a market value of \$1,000. Stocks, \$10,000; market [739] value \$2,000. Supposing that he raised the value \$1,000.

Cash in bank, \$1,000; same balance for market value. That is, cash and market value are the same.

Auto, \$2,000; market value, \$1,000.

Total assets, \$16,000 cost, \$20,000 market value.

Less a mortgage on the home, that is, a liability, \$8,000. Leaves a net worth on cost basis of \$8,000. Eight from sixteen is twelve, or market value \$8,000 from \$20,000 would be \$12,000.

“A net worth statement is an attempt to reconstruct the net worth at the end of certain years or accounting periods, based on costs, and comparing the balances to determine the increase or decrease during the period. To illustrate, using the example above based on cost:

“Balance December 31, 1951—” we have the same items—“home, furniture, stocks, cash in bank, with net worth \$8,000 at the end of December 31, 1951.”

Now, changes during 1952. Perhaps you showed \$1,000 worth of furniture with a balance up to

(Testimony of Roland D. Hellman.)

\$3,000. Perhaps you put \$1,000 cash in the bank, would increase the balance by \$2,000. Assume you paid \$500 on the mortgage, that would reduce the mortgage. Therefore there would be a change of \$500, bringing the balance down to \$7,500.

Opening balance of the net worth at the end of 1951 was \$8,000. There were \$2,500 changes during the year, giving the [740] balance at December 31st, 1952, of \$10,500.

Now, we compare net worth of December 31st, 1952, of \$10,500, and net worth at the beginning of the year \$8,000, and the increase is \$2,500.

“Where this method is used to determine the income on which to base the tax, the non-deductible expenses, living expenses and money spent for items not affecting the net worth are added to the increase at the end of the year.”

For example, living expenses for food, clothes, utilities, et cetera, \$200 per month estimated, would be \$2,400 spent for those items during the year.

Income tax paid, suppose it was \$600. There is \$3,000 spent, added to the sum of \$2,500 at the end of the year, would make net income based on increase in net worth \$5,500.

If the net income reported was \$5,000, the income was understated by \$500. If the net worth reported was \$6,000, the income was overstated by \$500, and net income based on increase in net worth was only \$5,500, reporting \$6,000 wouldn't have been overstated by \$500.

Mr. Drewes: Would you have any objection if

(Testimony of Roland D. Hellman.)

I asked one or two questions as to other matters——

Mr. Lewis: Yes.

Mr. Drewes: ——which might be included in such a statement?

Mr. Lewis: Yes.

Mr. Drewes: I would ask the witness: Mr. Hellman, I [741] note that under "Living Expenses" you have \$200 per month estimated. Why do you put an estimated figure down? Would that not be put in accurately if it was possible to do so?

A. If it were possible to do so, it would, but I have never seen a net worth statement accurately reflect actual living expenses of anyone.

Q. (By Mr. Lewis): Among the items which you have included, you would also include "Cash not in Bank," would you not?

A. Yes, cash on hand or in the bank.

Mr. Drewes: If among the assets there were income property, the value would be net of depreciation?

A. Net of depreciation, that is right.

Mr. Drewes: And with respect to cash in bank, the figure would be reconciled for outstanding checks?

A. That is correct.

Mr. Drewes: Thank you.

Mr. Lewis: Your Honor, I have prepared now sheets which I think correspond to our evidence on the record there, a very—it is based on the method——

(Testimony of Roland D. Hellman.)

The Court (Interposing): Do you have a stipulation?

Mr. Lewis: We start with a stipulation. The exact figures of the Government's stipulation, or the Government's computation, rather, your Honor. Do you still have those sheets there, Mr. Drewes, on which you were basing the net worth, Government's computation? I think the net worth was the same as [742] their stipulation, was it not?

Mr. Drewes: I don't recall what you are referring to. Is it these (handing documents to counsel)?

Mr. Lewis: Yes. Yes, the net worth is according to the stipulation, your Honor.

The Court: All right. I have examined this Schedule 3. Schedule 4, "Disposition of cash in safe deposit box," do you expect to offer some testimony in association with it?

Mr. Lewis: Well, what I intended to do in that regard, your Honor—

The Court: There isn't any basis in the record for many of these items.

Mr. Lewis: I think Mr. Hellman can testify as we go along on that matter, showing how he reaches the cash in box figure.

The Court: Wouldn't this be the subject of testimony by the defendant himself, if there be any basis for it, disposition of cash in the safe deposit box. The cash in the safe deposit box apparently was recurrently taken into the other phases of the business and had many, many ramifications.

Now I notice, without again extending my exam-

(Testimony of Roland D. Hellman.)

ination more than a brief moment, I see many transfers here, many negotiations, that probably only the defendant could account for.

Mr. Lewis: Well, your Honor——

The Court: Does the Government have this breakdown?

Mr. Lewis: Yes, your Honor, I am examining it now. [743]

Mr. Lewis: Your Honor, the first statement in that safe deposit box is the testimony of the defendant as to \$75,000, and the affidavit of Judge Friedman as to \$70,000, an excess of \$70,000, and that appears on the transcript.

The Court: Well, let's take the matter up and see as we go along.

Mr. Lewis: Yes.

The Court: Are there any questions on the part of any jurors with respect to the general illustration of net worth and net worth statement as submitted? Do you have copies, ladies and gentlemen, of this illustration of net worth?

In substance, the Court will hereafter charge you as to the law, and the illustration given by Mr. Lewis is in accordance with the general principles of law applicable to net worth as I will announce them to you. There may be refinements here and there that will enter into the matters, but by and large I would say that this is a fairly accurate presentation of what a net worth statement is.

Now, if there be any questions, you may address them to the Court, through Mr. Lewis, or to the

(Testimony of Roland D. Hellman.)

witness. If you haven't any at this juncture, feel free at any time to discuss any matters with the Court, because we are launching into a subject that is technical. Matters of accounting are—it is a field of art and endeavor entirely divorced from many of the engagements of the jurors; and ordinarily the jurors, [744] I suppose, feel quite content in many instances if you are able to balance your bank account, as sometimes the Court is. But we are involved in matters of accounting and it is a technical subject. And, under the circumstances, if there be any questions, feel free and have no reluctance to direct them to the Court at any time.

Mr. Lewis: I will pass out our proposed statements here to the jury.

The Court: Before these documents are passed to the jury, I think we had better have the foundation laid as to the preparation and attendant background and the predicate.

Mr. Lewis: Yes.

Q. Mr. Hellman, you take Schedules 3 and 4. We have just been discussing the net worth of Milton Olender in No. 3. Schedule 4 is disposition of cash in the safe deposit box. You started working on this case a few weeks ago, did you not, at my request? A. Yes, sir.

Q. And during that period of time did you go into where the funds came from and trace down through the banks the different investments, deposits by cash? Did you go through all the deposits

(Testimony of Roland D. Hellman.)

that were made by Milton Olender by cash into the store and personal accounts in the bank?

A. Into the cash—deposits into the personal account. The cash deposits in the store account are not questioned. [745]

Q. Now, this disposition of cash in the safe deposit box, you read the transcript in this case, did you not? A. Yes, sir.

Q. Where you show cash coming into the account, into the safe deposit box, it is taken from the testimony that appears, or from the schedules and exhibits that appear here in Court as to cash gifts; is that so?

A. Yes, that is the additions they are speaking of.

Q. Yes.

Mr. Shelton: If your Honor please, I think counsel can make his questions less leading in form. He can say where did he get it, and lead the witness less.

The Court: Have the witness in a general way state the basis and effort he made, what he did.

A. The Schedules 3 and 3-A—in Schedule 3 we started with assets, net worth as presented by the Government in their findings, and that comes a little above the middle of the page.

Then the adjustments made are adjustments based upon additions that we have—that have been discussed and are in evidence here, with the exception of this first item, the cash in safe deposit box, for which there is another schedule, Schedule 4,

(Testimony of Roland D. Hellman.)

which I anticipate we will go through as we go along, and as we go along those items that are objected to, we can explain them.

The other changes is additions to the net worth at the [746] end of 1944. The purpose of this schedule is to show that at the end of 1944 Mr. Olender's net worth was \$51,992.99 more than the Government contends. Therefore, at the end of 1945 his net worth was \$11,042.97 more than the Government contends at the end of 1940; Mr. Olender's net worth——

Mr. Drewes (Interposing): If your Honor please, the witness is just reciting conclusions. I understood he was to explain the source of this information.

A. I was explaining what we contend it is I list here.

The Court: All right. This document is not in evidence, Mr. Witness. I asked counsel to lay the foundation for its introduction. Bear in mind the Government has just seen it today. I have just examined it. The Government has a right and privilege to object to the introduction of any or all documents, and I am going to give them that opportunity.

Meanwhile, we have to find out whether this matter should be in evidence, find out how it was made, what happened.

Q. (By Mr. Lewis): Mr. Hellman, without telling us just what each item is about, tell us where

(Testimony of Roland D. Hellman.)

you got the information for this net worth statement, first, except for the cash item.

A. Except for the cash item? The other three items appearing for the end of 1944 were taken from evidence, items appearing here in Court as having been introduced in evidence. [747]

Q. In other words, the testimony of the \$1,000 check that you explained today, December 23, not deposited until January 10th?

A. That's right.

Q. Mr. Hellman, now the next item is the Goodman suit transaction into banks, and it is based on your answer to the question you gave right after the noon recess? A. Yes, that is right.

Q. The other change in the starting period is based upon your analysis of the accounts payable with the Smith and Barney transactions this morning amounting to \$600,903.02, and you read the— did you read the testimony concerning the \$20,000 worth of what has been called in this trial "Mother's Bonds"? A. Yes.

Q. And that is the basis for one other adjustment from the Government's? A. Yes.

Q. Now, we come to Schedule 4. Your basis was, your basis for the starting point of May 5, 1944, the statement of the taxpayer, Milton Olender, certified by the affidavit of Judge Friedman?

Mr. Shelton: Your Honor—your Honor—

Mr. Lewis: I am showing the basis of the whole account and these figures. [748]

Mr. Drewes: I assume if he were asked such

(Testimony of Roland D. Hellman.)

questions he would adopt the statement of Mr. Lewis as his answer. The witness hasn't stated yet—at least I haven't heard it—what the basis of his calculations were.

Q. (By Mr. Lewis): All right, explain in general terms, then, what is the basis of the Schedule 4? How did you go about making up that schedule and from what information?

A. Well, there are various items on this schedule that came from different sources. For instance, the source of the balance in cash in the safe deposit box was taken from information introduced as evidence by Mr. Olender's testimony here. The admissions, the column entitled "Additions," heading on the left-hand side in the middle there, those were items that were also testified to by Mr. Olender. Three are substantiated by U. S. exhibits. The withdrawals——

Mr. Drewes: Your Honor, please, would you ask the witness to identify the three reported by U. S. exhibits?

A. U. S. Exhibit 1, referred to right on the schedule. July 5th, 1944, U. S. Exhibit 24, for one gift. December 15, U. S. 24, for \$1,000. January 7, 1945, U. S. Exhibit 24, for \$3,000.

Q. (By Mr. Lewis): Isn't it true you relied on Exhibit 24, Schedule A, as was shown in each of those additions?

A. Yes, that is part of U. S. 24.

Mr. Drewes: Those are not in evidence. [749]

A. That is Mr. Ringo's. That is the figure the

(Testimony of Roland D. Hellman.)

Government based the whole net worth computation on, with minor adjustments. That is Mr. Ringo's net worth statement.

Mr. Shelton: That is objected to, if your Honor please, as not responsive.

The Court: That may be stricken.

Mr. Shelton: May I make one statement, your Honor?

The Court: Yes.

Mr. Shelton: That is part of Exhibit 25, which went in for identification and which the Government did not offer in evidence.

Mr. Hagerty: The defendant testified on that exhibit on direct examination as he testified and discussed those figures as outlined in the Government exhibit, and this witness has read the transcript.

Mr. Lewis: It is at page 417 of the transcript.

A. Do you want me to proceed with this explanation? The column entitled "withdrawals," the items marked "transfer to personal bank account," the analysis was made of all deposits into Milton Olender's personal bank account, his personal commercial account, not for the store.

Q. (By Mr. Lewis): You made that yourself?

A. I made that. I went to the Bank of America and looked at the original deposit tickets for these three years. And items "cash deposited in his personal account" were [750] assumed to come from cash out of the safe deposit box.

In making a net worth statement of this type

(Testimony of Roland D. Hellman.)

where you cannot definitely establish the flow of funds, you couldn't say where this fund came from. We know it didn't come as withdrawals from his personal account. The records would be decreased. Since he had no other source of income and he did have cash in the safety deposit box, in making my statement—I know the Government agents themselves had their assumption it would have come from some source——

Mr. Shelton: I object to the statement there was no other source of income. There is no evidence to support that.

The Court: Sustained.

A. Then as you go on, other than the transfers——

Mr. Lewis: Now pardon me just a moment on that. I think, your Honor, it will be necessary at this time—I thought that Mr. Olender testified that outside of the sources of income shown on his tax return and the money in the box from his father, and from the rental properties, and the stocks and bonds shown and discussed here in this case, which he admittedly purchased, that he presented in there, that he had no other income from any other source than the Army & Navy Store. And if that is true, it must come from out of that box.

Now, if it comes from any other place and the Government [751] shows any other transaction where it came from, we are in a bad way in presenting this as I am relying on the fact that the gifts, as set out here; the real properties, as set out

(Testimony of Roland D. Hellman.)

here; the stocks and bonds, as set out in the stipulation, and so forth, and the Army & Navy Store, the gifts were the only source of funds available to the defendant except the money out of the box.

The Court: The only income that was referred to during the course of the trial was an item of \$1,800 in connection with the accounting services he rendered; \$25 he allegedly or assertedly received in connection with the preparation of income tax returns. I don't know of any other references.

Mr. Lewis: And that \$1,800 item, your Honor, was back in about 1942, or some place back there. It isn't in these years.

The Witness: I wonder if—

The Court: Well, let's proceed on that.

A. On that thought I might inject this, that any amount shown on this withdrawal column is detrimental to Mr. Olender. In fact, any reduction of cash in the box is taken adversely to him, because the more withdrawals, the less he has at the end of each year.

The Court: Where is the personal account to which you make reference? Where is that account? Do you have it?

A. Transferred to the personal bank [752] account?

The Court: Yes.

A. We have the bank statements.

The Court: Do you have the bank statements?

A. That is right, on total deposits. I went over and examined individual deposit tickets showing

(Testimony of Roland D. Hellman.)

the cash deposits. The tickets, deposits themselves, will merely show total deposits, which we do not do. I have examined the deposit tickets, also.

The Court: Is the personal account a subject of disbursements against it as well as deposits?

A. If there were checks, there would be disbursements. His personal account is very small. It is an average of four or five checks a month that are on it.

The Court: How far back did you examine it?

A. From 1944 through 1946.

The Court: The Government has had an opportunity to examine those accounts?

Mr. Shelton: If the Court please, I am advised by the agents they did not get all 1945 checks and they did not get, as I recall it, many of the 1944 checks.

The Court: All those items should be made available to the Government at this juncture. Every item upon which you base your calculations, or based any of your findings in the preparation of any document should be made available to the Government. That will be the order of the Court [753] at this juncture, that any matters upon which you may have based an arithmetical finding be made available——

A. All of them——

The Court: ——including checks, deposit receipts and the like.

A. I believe they have been available all along.

(Testimony of Roland D. Hellman.)

The Court: Counsel, I am merely responding in the light of what was said.

A. The other types of transactions are withdrawals, purchase of Treasury Department bonds——

The Court: Pardon me.

Mr. Shelton: May I at this time ask defense counsel if they would turn over to the Government such 1944 and 1945 personal checks of the defendant as they have?

Mr. Lewis: Yes.

The Court: Turn them over at the recess period.

A. Other items, purchase of United States——

The Court (Interposing): And transcripts of the bank accounts for those months and years; that is, the usual bank transcript.

A. "Purchase of U. S. Treasury Bonds." That item was per U. S. exhibit, couldn't be presumed to have come from savings from that savings deposit box.

The \$2,160 item is testified to by, in evidence, by Mr. Olender as having come out from the cash on hand in the [754] box.

The other items, "Purchase of cashier's checks," totaling \$15,000, testified to by Mr. Olender.

Other transfers to the personal bank account, purchase of U. S. Treasury bonds in cash. The trustee bank account set up as coming from the safe deposit box. Other transfers, transfer to Olender-McGrete bank account which Mr. Olender

(Testimony of Roland D. Hellman.)

testified to as coming from cash, safe deposit box.
Transfer to personal bank account——

The Court: That would seem sufficient for commentation. Has the Government any questions to ask or submit in connection with this account at this juncture before I pass on the admissibility?

Mr. Drewes: No, we simply renew our objection, your Honor, that with respect to the—particularly with respect to the withdrawals from the deposit box, there is absolutely nothing in the record to support that.

The Court: We are not dealing with that exhibit. We are dealing with the other exhibit before we get to the matter of withdrawals from the box. May I see the withdrawals, please?

A. You don't have a copy?

The Court: No, I haven't.

Mr. Drewes: If your Honor shall refer to Schedule 3, I understand Schedule 4 [755] supports——

The Court: One is interwoven with the other.

Mr. Drewes: Precisely.

The Court: I agree with you on that score.

The Witness: Mr. Lewis, do you have another copy of No. 4?

Mr. Lewis: (Handing document to the witness.)

The Court: Well, let's take the very first item: "May 5th, cash in safe deposit box per count by Milton Olender and Monroe Friedman, \$75,000."

The very next item:

(Testimony of Roland D. Hellman.)

“May 5th, cash brought back from Texas trip, \$7,500.”

Then with the \$7,500 there is \$75,000?

A. That is correct.

Mr. Drewes: This Goodman transaction——

The Court: Just a minute. When he left to go on the Texas trip, he took \$7,500 from the \$75,000?

A. No, that was before the count. That is when accounting was made by Mr. Olender and Monroe Friedman together, because of the Texas trip.

The Court: I am not too sure the transcript will reflect it.

Mr. Drewes: I have two other points on that item. My recollection is, and I asked as to taking it out, my recollection is that he testified having taken five to ten thousand, of which [756] this would seem to be a compromise. I recall in his testimony he said he put it back.

The Court: No, this cash in safe deposit box finds only incomplete support from the record. Now, I haven't analyzed as yet, but there is the very first item. As I recall, the transcript does not support that item. At least, in my light and my recollection of the transcript.

Mr. Lewis: Your Honor——

The Court: I don't know how many other items will be reflected in the same fashion. Oh, you testify, Mr. Witness, that Schedule 3 and Schedule 4 are interwoven?

A. Yes, Schedule 3 refers to Schedule 4 in the computation. [757]

(Testimony of Roland D. Hellman.)

The Court: And the conclusions are based upon a composite of both Schedules 3 and 4; is that right?

A. Schedule 4 is part of Schedule 3, sir.

The Court: Yes. I think what we had better do, gentlemen, is attempt to analyze this situation. Here is a lengthy account of withdrawals from a safety deposit box. In the very nature of things, there was no running account kept by the defendant. At least there was nothing offered in evidence by him that he kept a running account of his transactions in and with the safe deposit box.

A. That is in the way you make up a net worth statement, go back and reconstruct—

The Court: Mr. Witness, please don't argue with me. I am trying my level best to analyze the situation. You have thrown at the Court—and I say "thrown" graciously—a multitude of statements. I am trying to rationalize it in my own humble way. I say that with abject humility.

I think I will adjourn the jury until Tuesday morning at 10 o'clock and thrash this matter out between counsel on both sides and see if we can arrive at some rationalization, because as it appears now, at least in whole or perhaps in part, I would have to sustain the objection of the Government to the introduction and that is all.

Now, it may be we can rationalize it.

Mr. Lewis: I think we can. I understand the Government [758] has many of those deposit slips under subpoena. They were subpoenaed today. I tried to get them, your Honor. The bank told me—

(Testimony of Roland D. Hellman.)

they gave me a long list, said, "We don't know whether this is what you want or not."

The Court: "September 23rd, 1943, down payment on furniture, W. & J. Sloane, \$1,000." Does that appear any place in the books of account?

A. No, there isn't.

The Court: Where did you get that figure?

A. That figure is based on information—I believe that is—

The Court: Where was the information received, and how was the information received, and where was the information received?

A. Listed as expenditure by Mr. Olender in the net worth statement.

The Court: Which net worth statement?

A. Do you have a copy of it, Mr. Lewis?

Mr. Drewes: That is included in the stipulation, your Honor, but that is not the objection.

The Court: All right.

Mr. Lewis: Your Honor, were you going to excuse the jury?

The Court: Just one second. The jury may be excused, then, until Tuesday at 10 o'clock, with the same admonition not to discuss the case under any circumstances, and not to form or express any opinion until the matter is submitted to you. [759]

A Juror: Your Honor, if he is going to read all of those figures, could the jury have a copy of it—I mean, next time?

The Court: Is the jury still present? May I ask them to remain momentarily?

(Testimony of Roland D. Hellman.)

The avowed purpose, ladies and gentlemen, of this recess is an attempt to define some of these mathematical drafts and documents referred to by the accountant, who is an expert in his field, for the purpose of admitting them in evidence. They are being subjected to scrutiny and test, and until such time as the Court determines there is a foundation for the introduction, they will have to await that period of time. So we will attempt to refine the matter.

Tuesday you may or may not receive them as a result of this conference.

(Thereupon, at the hour of 3 o'clock p.m., the jury left the Courtroom.)

The Court: Counsel, is the jury absent? Are we not approaching the matter of the introduction of Schedule 4 in a rather circuitous way? To this extent: I haven't had the benefit of the views of counsel for the Government nor the experts, and I can't examine each item. Merely from the collective picture that I get, at least in part there appears to be lack of support for certain of the items.

Now, would it not be advisable, as a basis for the introduction [760] of Schedule 4 and/or Schedule 3, or both of them, individually or collectively, to have the defendant take the stand in connection with certain things? Or has he taken the stand sufficiently to make this exhibit a credit?

Mr. Lewis: I think he has, your Honor, on all the additions to the cash. As to the withdrawals, you could present it in two ways. We could put the

(Testimony of Roland D. Hellman.)

additions to the cash and not put any withdrawal list and not present our schedule of net worth, just simply come out and say, "Fight all our items like Goodman's matter——"

The Court: Let's pause a moment and see if we can define our position. The Government is entitled to cross-examine on any or all of the items, aren't they?

Mr. Lewis: That is correct.

The Court: And now, in all the items upon which you predicate any of your arithmetical conclusions should be made the subject of investigation by the Government and the Court's scrutiny. Are there any items, counsel for the Government, here—and I would like your assistance as much as I can receive it in connection with tracing these problems out—are any items here to which objection is made?

Mr. Drewes: If your Honor please, from the viewpoint of the prosecution we would prefer to have the witness testify from the schedules and take them on cross-examination. As I understand it, this is a summary of his testimony. It isn't [761] evidence in the case.

The Court: Here we have a safe deposit box which evidences a basis for the defense in the compilation of net worth. The Government has a difference, a right at the very threshold of the figures, a difference of 23-odd thousand dollars. The Government takes the position that the starting figure was \$50,000, they had the amount in the safe deposit box.

(Testimony of Roland D. Hellman.)

Mr. Drewes: Correct.

The Court: The defense claims \$23,000 and some odd dollars. \$75,000 starting, then there being deductions here and there. Take that differential there, \$23,000. That is a very, very large figure.

Mr. Drewes: It is a very large figure.

The Court: How did the Government arrive at the figure of \$50,000?

Mr. Drewes: From the exhibits in evidence, information furnished by the defendant to his then accountant, Mr. Ringo, stating that as of that date he had \$50,000. It was to his best interest to make it as large as possible.

The Court: Yes, as a starting figure.

Mr. Drewes: As a starting figure.

The Court: On that little exhibit, in part at least, we find his handwriting.

Mr. Drewes: There are two exhibits. On one, yes.

The Court: All right, now, take up the first item, \$75,000. [762] May I have your assistance as we go along, counsel?

Mr. Drewes: Yes, your Honor.

The Court: As well as Mr. Shelton's. I may be incorrect in my recollection of the transcript, but my present recollection is that from the amount in the box the defendant withdrew some monies, \$7500; that then Monroe Friedman's name was transferred as one of the joint tenants on the box; then when the defendant returned from Texas, his name was

(Testimony of Roland D. Hellman.)

taken off the box. The affidavit in evidence shows there was account and accounting——

Mr. Shelton: \$70,000, plus, I believe—over \$70,000.

The Court: Certainly to the first item the defendant should be subjected to cross-examination and submit under oath to the basis on that score.

The next item, “June 16, Transfer to personal bank account, \$100.” That is a reconstruction, apparently. This gentleman states he examined the personal bank account and finds \$100 therein. And he says, ergo, the fact is that must come from the safe deposit box. Well, I don’t know anything about it at all, and I am not going to draw any such inference.

The Witness: It is that, or you have to leave it off.

The Court: I don’t think such an inference is either in keeping with the record or in keeping with the background of these events. There is an item of \$400, transferred to personal bank account. I assume the same situation prevails? [763]

The Witness: That is correct.

The Court: Well, another item, “\$1500 Transfer to personal bank account.” That finds its way into the bank account from, you claim, the safe deposit box?

The Witness: That is the only source.

The Court: That is the inference you draw.

The Witness: That’s right. It is an attempt to reconstruct——

(Testimony of Roland D. Hellman.)

The Court: Supposing—let's take this situation for the purpose of illustration: Supposing the defendant had transactions in his store of a cash nature during that period of time, and instead of depositing, let us say, \$1,000 in the bank account in the Bank of America or other store account as he may have, he puts the money in his personal account. Isn't that just as reasonable and fair to draw that inference as to draw the inference he got it from his safe deposit box?

The Witness: Yes, except that what happened to the \$75,000 he started with? Where did it go? It had to go some place?

The Court: Now, now, now. You assume he had \$75,000. For my purpose, and only for the purpose of dissecting this animal in front of me, I am not going to assume that. I am going to say you elevated your figure. I am not going to say he had \$75,000, but he had \$50,000, for the purpose of my discussion. Am I going to be committed—when I say "I," you [764] know I mean the Government—are they in a position where they would be foreclosed from attacking the figure?

Mr. Lewis: No, your Honor. I expect them to cross-examine about these figures.

The Court: No, I think I would be in palpable error if I permitted the introduction of the schedules offered on the record before me, Mr. Lewis.

Mr. Hagerty: If your Honor please—

The Court: Yes?

Mr. Hagerty: Yesterday on direct examination,

(Testimony of Roland D. Hellman.)

and I am looking for the testimony—his testimony was, “——

Mr. Shelton: What page, Mr. Hagerty? [765]

Mr. Hagerty: I will find it. I am looking for it. I started him with the Goodman transaction, at which time he went through \$20,550 and—that he bought cashier’s checks, on which there was some evidence, something brought up by the Government, and that was in January of ’44. Then he was going to go to San Antonio, Texas, apparently to see a silent partner, having in mind buying an Army and Navy Store stock. So he withdrew some money—he said between five and ten thousand dollars—from the bank, and then he decided to put Monroe Friedman on his box, and so he and Monroe Friedman made a count of the money in the box. The affidavit in reference to that count was made after he had drawn this figure between five and ten thousand dollars, he said on direct examination, to carry with him for this business transaction in Texas, which fell through because he got there too late or the stock was sold to somebody else.

Mr. Shelton: May I interrupt?

Mr. Hagerty: I am looking for that testimony. Just as soon as I find it I will give you the page number.

The Court: Maybe I am incorrect, there was a lot of testimony——

Mr. Hagerty: It is voluminous on the subject. It was difficult to get it all in, to keep it all in mind myself, and some of it went in on the redirect and

(Testimony of Roland D. Hellman.)

then some of it went in on the second redirect. I am just not too sure where [766] it is. I am having Mr. Lieberman help me locate it in the transcript.

Mr. Shelton: May I point out that the Friedman affidavit does not say this was Olender's money. He said he just counted it. Now there is one question that the Government is entitled to, I think, have the defense make proof on, that they rely on it, that that money in the safe deposit box was all Olender's money and it was not being held for anybody else.

Mr. Hagerty: He has testified to that already, many times in the transcript. I can cite you many pages of that, page 411, 415.

The Court: Let us take, Mr. Witness, December 31, balance of cash, \$10,000. What do you mean by that?

A. December 31 of what?

The Court: On the Schedule 4.

A. What year?

The Court: 1945, this \$10,000 item.

A. Transfer to personal bank account.

The Court: It says, "Balance of cash."

A. Balance of cash is the \$30,517 on the extreme right column. The three figures on the extreme right. There are four figures there. They represent the balances which again were—the top one is the balance as of May 5, 1944. Then we have December 3, 1944, balance of—the December [767] 31, 1945, balance; the December 31, 1946, balance.

The Court: I see. Now when you say "transfer

(Testimony of Roland D. Hellman.)

to personal bank account," again in similar fashion, you arrive at that conclusion or you draw that inference by comparing his personal bank account deposits, do you?

A. By looking at the personal bank account deposits, seeing a \$10,000 cash deposit.

The Court: Yes?

A. By checking his store records to see that he did not withdraw that from his store.

The Court: Yes?

A. By checking other sources of income to see that no such \$10,000 came in on or about that time.

The Court: Yes.

A. Where else could the cash come from?

The Court: Did you ask the defendant at any time where that cash came from?

A. Yes.

The Court: All right. Now, "May 1, 1946, transfer to personal bank account, \$6,000." "May 1st, 1946, transfer to Olender-McGrete bank account, \$570.38."

Who is McGrete?

A. That is a venture that Mr. Olender was going to go into and they were to put up this money in a separate bank account and the venture fell [768] through.

The Court: Have we heard of a McGrete at any time before in this case?

A. There has been——

The Court: This is the first time I have heard of McGrete. Is that correct?

(Testimony of Roland D. Hellman.)

Mr. Lewis: I don't think that any evidence has been introduced, your Honor, as to it.

The Court: Don't you think we are entitled to go into those matters? I think so.

Mr. Lewis: Well, it is just an asset that disappeared by the time of the end of the year and under the net worth system——

The Court: If I permitted this type of examination and the introduction of this type of exhibit, I would foreclose the opposition, whether you be in the position of the opposition or not, Mr. Lewis, of examining on the items, because this man would merely say: "Well, I drew this inference," and reconstruct it. Now, there is no occasion for hypothetical reconstruction, when the defendant himself is available and when his bookkeeper, who functioned for him, is likewise available. I think we are dealing in a phantom situation here, when in truth and in fact, the witnesses are available. Therefore, it is my ruling, I shall sustain objections by the Government to Schedules 3 and 4, when and if they are posed formally, lest and until there be a basis for the [769] introduction of such exhibits through the medium of Mr. Olender taking the stand and testifying as to the items which may not have been testified to heretofore.

Mr. Hagerty: Then we will put the defendant on the first thing Tuesday and establish the record.

The Court: Are there any other matters, gentlemen, now before the Court either from the defense's view or the Government's?

(Testimony of Roland D. Hellman.)

Mr. Drewes: No other matter, your Honor.

The Court: Now, on the trusteeships, Milton Olender, trustee. Will you refresh the Court as to the basis of the trusteeship and what the background is?

Mr. Lewis: Oh, that was way back in the early days where Mr. Olender was a trustee for certain real properties of the family in Fresno. Of course we are dealing in this net worth statement with the \$15,000 trustee's funds that come into the net worth in one of these years.

The Court: Why and under what circumstances were these three \$5,000 items withdrawn and deposited in the trustee savings account?

Mr. Lewis: Well, that goes right into net worth. They appear on the trustee's savings account as an asset of Mr. Olender, making up part of his net worth.

Mr. Shelton: But that doesn't establish the source, your Honor. [770]

The Court: The question naturally that arises in the light of the first question I pose, the next question is, how much of that alleged \$75,000 or \$73,000 or \$70,000 or \$50,000 was trustee money?

Mr. Lewis: Well, as a matter of fact, he had absolute control over it. I don't think he even told the children about it. And he——

The Court: Was he a self-constituted trustee?

Mr. Lewis: Yes.

The Court: What was the nature of the trust, what was the declaration of trust?

(Testimony of Roland D. Hellman.)

Mr. Lewis: There are none. Just Milton Olender, trustee, for the respective three children on the bank statement. It was just a trustee bank account.

The Court: I see. James Harold Olender is the son by the former marriage, is he?

The Defendant: That is my son.

Mr. Lewis: That is his son.

The Court: His son. And Richard Raymond Busby, is the young man who—

Mr. Lewis: Yes, stepson.

The Court: And Audrey Elaine Olender is the daughter?

Mr. Lewis: Daughter.

The Court: Daughter.

Mr. Lewis: Your Honor, I think a lot of these things— [771]

The Court: “Purchase of merchandise for store by cash—Barney, \$2,160.03,” we made reference to that transaction, one of those account payable items.

The Witness: That’s right.

The Court: Yes.

Mr. Hagerty: Your Honor, on page 356 of the transcript I found the San Antonio trip, line 6. I asked him the question:

“Q. Had you taken any currency out of this box in preparation for the trip”——

That is the Texas trip——

“——before you brought Monroe Friedman to look at and examine the contents of the box?

“A. I did.

“Q. How much had you taken out then?

(Testimony of Roland D. Hellman.)

“A. Somewhere between five and ten thousand dollars. I don’t remember the exact amount.

“Q. And it is your testimony that you were taking that sum with you and if you needed more you would send to Monroe Friedman to get it from the box? A. That’s it.

“Q. Now, this was in about April of 1944, is that true? A. Yes.” [772]

The Court: Then my recollection is incorrect.

Mr. Hagerty: Well, it is an involved set of facts. It is complicated. But I had tried on direct examination to establish how much he had in that box at approximately the first of the year, 1944, and it was in excess of——

Mr. Drewes: Where did he put it back?

Mr. Hagerty: What?

Mr. Drewes: Where did he put it back, Mr. Hagerty?

Mr. Hagerty: If he says he put it back. Maybe I didn’t bring that out.

The Court: I think now the interval of time may be a fortuitous one in the sense that——

Mr. Lewis: I would like to read that transcript myself, your Honor, before midnight.

The Court: ——of possibly clarifying the record for the Jury and the Court. Here is an illustration wherein apparently my recollection is not as good as the transcript and also it will give counsel and the technicians, the experts, an opportunity to go over the invoices on the purchases and prepare themselves for Tuesday, at which time I expect that

(Testimony of Roland D. Hellman.)

the defendant will take the stand in connection with the basis or predicate for the possible introduction into evidence of Schedules 3, 4.

Mr. Lewis: Yes, sir.

The Court: May I see No. 4, please? No. 4 is the— [773] No. 3 is the—you finally arrive at the position that the defendant overpaid his tax?

Mr. Lewis: Yes.

The Court: In each year?

Mr. Lewis: Yes, your Honor.

The Witness: Yes. Based upon net worth, sir.

Mr. Lewis: Based upon a net worth.

You have Schedule 3?

The Court: Schedule 3, 3-A.

May I see the affidavit of Monroe Friedman?

You have a starting differential right at the “balance of cash, \$73,539.97.”

Mr. Hagerty: Yes.

Mr. Shelton: Your Honor, it might shorten—

The Court: Here is the subject matter of that paragraph (referring to defendant's Exhibit D, affidavit of Monroe Friedman):

“That on April 22, 1944, I met Olender by appointment at the Bank of America, National Trust & Savings Association, 12th Street and Broadway, Oakland, California; that on that day, safe deposit box No. 56 in said bank was transferred from the names of Milton Olender and his wife to the names of Milton Olender and Monroe Friedman; that I went in with him to look at the safe deposit [774] box itself; that Olender opened it in my presence;

(Testimony of Roland D. Hellman.)

that there were several papers and some bonds in the box, and also over \$70,000 in United States currency; that Olender gave me the key to said box.

“That on May 5, 1944, after Olender had returned from Texas, I again met him at the same bank by appointment, and the same safe deposit box was transferred back to the names of Mr. and Mrs. Milton Olender; that on that day, Olender opened the said box in my presence, and the contents were the same as on April 22, 1944.”

We will adjourn until Tuesday at ten o'clock, unless there be some other matters.

The Witness: I have a question, your Honor. Regarding the checking of the invoices, the Government agents and myself intend to come in Monday morning. I wonder if the Court could order that the evidence, Mr. Olender's books, be here so that we could check them.

And also in checking the books, in checking off which invoices we have and which ones we don't have, would it be proper to make small red tick marks in that book for our auditing purposes?

The Court: There is no objection.

The Witness: We intend to be here at 9 o'clock Monday morning. [775]

The Court: Make it 9:30. The Clerk has many duties here. 9:30.

The Clerk: I will have them available Monday morning.

The Court: Now the Government has a copy of Schedules 3, 3-A and 4?

(Testimony of Roland D. Hellman.)

Mr. Drewes: We do, your Honor.

The Court: We will adjourn until Monday, at ten o'clock.

(Thereupon an adjournment was taken in this matter until ten o'clock Tuesday, September 30th, 1952.) [776]

September 30, 1952—10:00 A.M.

The Clerk: United States vs. Olender, on trial.

Mr. Hagerty: At this time, if your Honor please, in order to further qualify the statistical studies made by the accountant, we ask permission to withdraw the accountant from the stand and put the defendant back on the stand.

The Court: Is it stipulated that the jury is present?

Mr. Hagerty: So stipulated.

Mr. Drewes: So stipulated, your Honor.

If your Honor please, before that is done, counsel for the defendant has just before your Honor took the bench handed us revised schedules. The prosecution would ask that we have a recess at this time, a short recess, to give us an opportunity to study these revised schedules before further testimony is taken. We had no opportunity to compare them with those which were earlier served upon us.

The Court: Are there radical changes? I mean by radical changes, in the sense——

Mr. Hagerty: I don't believe that there is. We have been pursuing our studies and digging through

(Testimony of Roland D. Hellman.)

old invoices all the time. We find that there is some adjustment to be made. Mr. Lewis, I think he would be better qualified to state this than I.

Mr. Drewes: We really feel we should have 10 or 15 [777] minutes to compare these before any further testimony is taken.

The Court: If I had known I would not have called the Jury in. Now we have to send them back.

Mr. Drewes: The Clerk was out of the Court, your Honor. The revised schedules, your Honor, for the record, are No. 3, 3-A and 4.

Mr. Hagerty: We have produced, your Honor, bank statements and checks and so forth and they are now turned over to the Government.

The Court: The Jury has heard the discussion between Court and counsel, and under the circumstances I will accede to the request of Government counsel and an interval of time will be permitted to study these.

What are they, amended schedules?

Mr. Lewis: Yes, your Honor. And there also have been put in two or three items. In reading the long transcript over the week end, I notice that two items—your Honor called attention to one—were not—

The Court: I am on schedule 3. The only changes are in the adjustments under the additions in the safe deposit box, apparently of any radical nature. Schedule 3-A—

All right. I will allow an interval of time in which to examine these.

The Jury is excused. [778]

(Thereupon a short recess was taken.)

MILTON H. OLENDER

resumed the stand, and having been previously duly sworn, testified further as follows:

The Clerk: Mr. Olender, will you please restate your name for the record?

A. Milton Howard Olender.

Redirect Examination

(Resumed)

By Mr. Hagerty:

Q. Mr. Olender, would you tell his Honor and the ladies and gentlemen of the Jury what your sources of income and/or funds were during the time in question under this indictment?

Mr. Shelton: Objected to, if your Honor please, on the ground that the foundation has not been laid by showing what documentary evidence is available on the subject before the witness is asked this broad oral question, what documentary evidence has been produced and is available before—

The Court: The question is preliminary. You may answer.

A. What was that question again?

Q. (By Mr. Hagerty): What were your sources of income during the period 1945 and '46, or 1944, the base year?

(Testimony of Milton H. Olender.)

A. Well, first, of course, was from the Army & Navy Store, my business; and, secondly, the income from my [779] rental property in Fresno; and then there was, third, the income from stocks and bonds listed in Mr. Ringo's net worth statement; and, fourth, the gifts and such from my mother; and also the money entrusted to me by Mrs. Foote; and then lastly, my safe deposit box.

Q. And if you dealt in any cash transactions during this period of time, where would the cash come from?

A. Well, it would either have to come from my accounts, my bank accounts, or in the event it did not come from there it would have to come from my safe deposit box.

Q. In the course of your books there is indication that you had an account known as the Olender-McGrete account?

A. Yes, sir.

Q. Would you tell his Honor and the ladies and gentlemen of the Jury what that account was about?

A. I believe the year was 1945, Mr. McGrete and his wife were very close personal friends of Mrs. Olender and me, and he wanted to open a race track at Pacheco, which has since been opened and has been operating ever since.

Q. Where is Pacheco?

A. It is right out of Concord in Contra Costa County.

And he didn't have the funds, but he was always a race enthusiast. In fact, he was a motorboat champion.

(Testimony of Milton H. Olender.)

And he asked me if I wouldn't invest the funds and go in on a fifty-fifty basis with him on this particular thing. [780]

So I advanced the sum of \$5,000, which I withdrew from my safe deposit box, and opened the account.

Shortly thereafter, due to the fact that he had a young son who wanted to run the thing and tried to tell me how to run my own business and to leave it and go out there——

Q. In other words, friction developed?

A. Friction developed.

Q. Then what happened?

A. We decided to dissolve the partnership.

In the meantime, Mr. McGrete had used at my—I had signed the checks, about three checks totalling something over \$700, which had come out of the account.

Mr. Shelton: Just a minute. Your Honor, if they are going to prove the exact amount of that—are the checks available rather than the oral statement of the witness?

A. Yes.

Mr. Hagerty: You have seen them already.

The Court: Are you leading to an item in the account?

Mr. Hagerty: Yes, your Honor, explaining one of the accounts in the schedule.

Q. At this time, Mr. Olender, I will show you three bank statements, a bank book, a deposit slip,

(Testimony of Milton H. Olender.)

four checks and a quitclaim release and ask you if you recognize them? A. I do.

Q. What are they? [781]

A. Well, the checks are checks signed by me during the course of this account.

Q. In other words, it would be fair to say, Mr. Olender, that those are the entire documents representing the date of the Olender-McGrete deal?

A. They are?

Q. Which was this proposed investment in a race track, from which you withdrew after certain disagreements developed? A. That's correct.

Q. Is the quitclaim release signed by you and Mr. McGrete?

A. It is my signature, and I am quite sure it is Mr. McGrete's or I wouldn't have accepted it.

Mr. Hagerty: At this time, if your Honor please, I would offer this group of documents in evidence as the defense's next exhibit.

The Court: Counsel, you have examined it?

Mr. Hagerty: Yes, they have.

The Court: It may be marked.

The Clerk: As one exhibit?

Mr. Hagerty: I think that would be best.

The Clerk: Defendant's collective Exhibit AB in evidence.

(The group of documents consisting of three bank statements, a bank book, a deposit slip, four checks, and [782] a quitclaim release were received in evidence and marked Defendant's Exhibit AB.)

(Testimony of Milton H. Olender.)

Q. (By Mr. Hagerty): Now, Mr. Olender, did you draw a final check of \$5,000 to clear this account? A. I did.

Q. And that check was made payable to whom?

A. The Asturias Export and Import Company.

Q. And will you explain that transaction to his Honor and the ladies and gentlemen of the Jury?

A. Well, when the account was reconciled and Mr. McGrete had returned the funds to me which I had laid out, the account was still \$5,000, and I then invested that \$5,000, closing out of the Olender and McGrete account, into the Asturias Export and Import Company, and bought the original \$5,000 of stock.

Q. And is that the transaction that you deemed to be worthless stock when you discussed it with Ringo?

Mr. Shelton: Objected to, your Honor, on the ground it calls for the conclusion of the witness as to what was worthless. There has been extensive testimony in the record as to whether or not it was worthless at the end of the year '46, which is the period involved in this indictment.

Mr. Hagerty: The purpose of my question, your Honor, is merely to bring to the presence of the Jury a fixing point as to this transaction and relating it to the Asturias [783] transaction.

Mr. Shelton: But, if your Honor please, he is asking the witness for his conclusion about something which is a matter of law as to whether or not it was worthless at the time.

(Testimony of Milton H. Olender.)

Mr. Hagerty: Well, the record is filled with conclusions as to the value of the Asturias stock pro and con, your Honor.

I was merely trying to fix this transaction in reference to the entire case for the convenience of the Jury.

The Court: The objection is overruled.

A. What was your question, Mr. Hagerty?

Mr. Hagerty: I will withdraw it and reframe it.

Q. Mr. Olender, this \$5,000 check which you drew payable to the Asturias Corporation, which cleared the Olender-McGrete account, that was the investment and securities which you later deemed worthless? A. Yes.

Q. Is that correct? A. Yes.

Mr. Hagerty: At this time——

The Court: Which he claims it to be worthless. That is his claim.

Mr. Hagerty: He claims it to be worthless.

The Court: All right. [784]

Mr. Hagerty: At this time, if your Honor please, I would like to pass this to the Jury so that they may see it.

(Defendant's Exhibit AB passed to the Jury.)

Mr. Hagerty: At this time, your Honor, in order to expedite the matter, I will ask him to identify some documents while the Jury is looking at that exhibit.

Q. (By Mr. Hagerty): Mr. Olender, I show

(Testimony of Milton H. Olender.)

you a sheaf of bank statements and ask you if you can identify them?

A. Yes, sir, they are my personal commercial account bank statements.

Mr. Hagerty: At this time, if your Honor please, I ask that they be offered in evidence as the next exhibit of the defendant's. The Government counsel has already seen all these things.

Mr. Shelton: If your Honor please, may I ask a question or two on voir dire?

The Court: Yes.

Q. (By Mr. Shelton): Mr. Olender, what period is covered by these bank statements that your counsel has just showed you?

A. I didn't look at the period. Hand them up and I will tell you.

Mr. Shelton: May I approach the witness?

The Court: Yes. [785]

A. I assume they are in order, Mr. Shelton.

Q. (By Mr. Shelton): I didn't change them, Mr. Olender.

A. Well, I don't know.

Mr. Hagerty: Well, in the interests of time, they run from '44 to the end of '46, the first part of '47.

A. They start as of December 31, 1943, I presume. The next item is January 14, 1944, and they end with January 29, 1947.

Q. (By Mr. Shelton): Mr. Olender, have you checked them to see that they are a complete ledger record of the account for that period?

A. No, sir, I hadn't—

Mr. Shelton: If your Honor please, before they

(Testimony of Milton H. Olender.)

are offered in evidence we would like to be sure they are a complete record.

The Court: Do they run in sequence?

A. I believe they do.

Mr. Hagerty: Yes.

The Court: Well, if there be any discrepancies you will supplement this offer by another offer, if demand by the Government?

Mr. Hagerty: We will render everything that we can, your Honor. I think if there are any discrepancies he can clear them up on cross-examination.

The Court: All right. [786]

Mr. Shelton: One further question.

Q. Was this the only personal bank account you had during that period, Mr. Olender?

A. No, sir, it was not.

Mr. Hagerty: We will explain that more in detail as we go along.

The Court: All right.

Mr. Hagerty: And here are some checks, Mr. Olender (handing to the witness).

The Court: They may be marked.

The Clerk: Defendant's Exhibit AC in evidence.

(Thereupon group of bank statements were received in evidence and marked Defendant's Exhibit AC.)

Q. (By Mr. Hagerty): I hand you a group of checks and a group of deposit slips. Can you identify them?

(Testimony of Milton H. Olender.)

A. Well, the checks are checks from my personal commercial account. The deposit slips are deposit slips from my commercial account.

Mr. Hagerty: At this time we will offer these in evidence as defendant's next exhibit.

Mr. Shelton: If your Honor please, I would like to ask a couple of questions on voir dire?

The Court: Yes.

Q. (By Mr. Shelton): Mr. Olender, I will ask you what period of time is covered by this series of checks? [787]

A. I assume these are in order, Mr. Shelton. I do not know if they are in order. The first one starts at February 23, 1944, and the last one is December 12, 1946.

Q. On what account are they drawn, Mr. Olender? A. Milton H. Olender account.

Q. Is that the personal account?

A. That is my personal account.

The Court: Pardon me. Offer that juror a drink of water.

All right.

Mr. Shelton: I will ask you whether or not those are all the checks on that bank account during that period?

A. I do not believe they are all of them. There may be one or two missing.

Q. Are there more than two checks missing?

A. I wouldn't know how many are missing.

Q. Well, did you make any effort to determine,

(Testimony of Milton H. Olender.)

Mr. Olender, how complete that check list is or did you just bring in some checks?

A. I gave all the checks that I have to my accountants and my attorneys.

Q. And you don't know how many checks for that period are missing? A. No, I don't.

Q. Do you have any other checks on that account during that [788] period which you did not produce here in Court?

A. I have no checks of any kind that I know where they are.

The Court: Pardon me. Just a minute. May I address the juror? Counsel, may I interrupt you momentarily?

Madame, have you been suffering from a severe cold?

A Juror: I caught a cold Friday.

The Court: I think under the circumstances, with the stipulation of counsel, this juror may be excused. She is suffering with a severe cold.

Would you like to be excused from this jury?

A Juror: I would like to.

The Court: Apparently she is not well.

Mr. Drewes: No objection.

Mr. Hagerty: We will so stipulate.

The Court: It is discomfoting to her as well as the other jurors. And with the stipulation of counsel, this juror may now be excused from further attendance in the trial of this case.

The alternate juror—there is one alternate juror remaining. Where is the alternate juror? The alter-

(Testimony of Milton H. Olender.)

nate juror may now take the place of the juror who is being excused by stipulation.

Q. (By Mr. Shelton): Mr. Olender, have you produced here this morning and identified the ledger account which would reflect checks cashed during the period covered by that group [789] of checks?

A. Do you mean those papers I just handed to the Judge?

Q. I mean the ledger account, Mr. Olender. You know what a ledger account is, do you not?

A. I know——

Mr. Hagerty: He is arguing with the witness. He is referring to these. Are these bank statements covering those checks?

A. That is what you are referring to, Mr. Shelton?

Mr. Shelton: I am referring to this exhibit, Mr. Olender, which I hand you, a group of bank ledgers. Do you identify those? You identified those this morning.

A. I identified them as my bank account.

Q. Well, as your bank ledgers then?

A. Yes, sir.

Q. Before coming to Court did you make any effort to check that ledger record against the checks to see how many checks were shown on the ledger which were not produced here as checks?

A. Not to my knowledge.

Q. So you don't know how many of the checks which are shown by the ledger to have been drawn were not produced here this morning?

(Testimony of Milton H. Olender.)

A. No, I don't.

Q. Mr. Olender, I also show you a group of deposit tickets [790] and ask you whether or not those deposit tickets relate to the ledger record which is here before you? A. I believe that they do.

Q. I will ask you whether or not if before coming to Court you made any check to determine whether the deposit slips produced there account for the deposits shown on those ledger sheets?

Mr. Hagerty: If your Honor please, I feel this is a matter of cross-examination.

Mr. Shelton: Before——

Mr. Hagerty: Mr. Olender has produced for us the records that he could find. Mr. Olender first turned those records to the Government agents more than five years ago.

Mr. Shelton: When——

Mr. Hagerty: He then turned them to the accountant by the name of Ringo. He then turned them to other attorneys—I think there were two sets of attorneys and accountants before we came in the case. If there are any missing——

The Court: Have they remained intact?

A. I do not believe so. There are some missing that I gave them. You see, I had started with——

Mr. Shelton: If your Honor please, first, we expect to offer evidence from the agents that some of those checks which are produced have never been shown to the Government agents at any time, and, in the second place, if your Honor [791] please, we respectfully submit that we are entitled to show

(Testimony of Milton H. Olender.)

whether the record is complete before it is admitted into evidence.

The Court: Well, it is a prima facie showing, I take it?

Mr. Hagerty: Yes.

The Court: It is sufficient to make——

Mr. Hagerty: Yes——

The Court: It is difficult for us both to speak at once.

Mr. Hagerty: I am sorry.

The Court: I think there is sufficient to permit their introduction. If there be discrepancies or omissions or exceptions of any kind, it may be developed on cross-examination.

Now what is your theory upon which you offer these documents, what is the basis?

Mr. Hagerty: We are accounting for funds in and out of the safety deposit box, transactions in cash that he had, various transactions connected with his business.

The Court: And this will lead up to the schedules which you are——

Mr. Hagerty: Yes, your Honor. These will qualify the schedule.

The Court: On that representation they may be admitted. [792]

The Clerk: Defendant's collective Exhibits AD and AE.

(Thereupon the checks and deposit slips were received in evidence and marked, respectively, defendant's Exhibits AD and AE.)

(Testimony of Milton H. Olender.)

Q. (By Mr. Hagerty): At this time, Mr. Olender, I show you three deposit slips on the Bank of America in the name of Olender and Elkus by Milton Olender, and ask you if you can identify them? A. Yes, sir.

Q. Can you explain the account that they are deposits on?

A. Well, this is another personal account of mine set up, I believe, early in '41 or '42, in which Mr. Elkus, who is the—one of the part owners of Money Back Smith in Oakland, brought to me on two occasions two very large Government deals. They were sales to the United States Government, as I remember them—my figures may not be correct—totalling, one, \$18,000, and the other one some nine, ten, or eleven thousand dollars, and Smith's being—

Mr. Shelton: Just a minute, Mr. Olender.

If your Honor please, these long recitals don't make—

The Court: In any event, the moneys finally wound their way into your account?

A. They were always my account. Mr. Elkus never had anything to do with it.

The Court: That explains it all right. [793]

Q. (By Mr. Hagerty): Now, do you still have that account in the name of Olender-Elkus?

A. No, sir, it was closed out. The funds were transferred to my commercial account.

Q. When was it closed out?

A. I am not sure of the year. Perhaps—

Q. Approximately?

(Testimony of Milton H. Olender.)

A. Perhaps 1946, I believe.

Q. When was the last transaction in this account that you and Mr. Elkus had?

Mr. Shelton: Objected to—

Mr. Hagerty: Approximately.

Mr. Shelton: Objected to, if your Honor please, on the ground that the record of the account would be the best evidence.

The Court: Well, if he had an independent recollection—you may answer.

A. I am not sure, your Honor. He is correct in that. It shows in the account there.

Q. (By Mr. Hagerty): I will ask you this: During the years 1945 and '46, which are under question in this indictment, did you have any transactions—

A. Practically none.

Q. —through this account?

A. Practically none. [794]

Mr. Hagerty: At this time I offer these deposit slips in evidence.

The Court: They may be marked.

The Clerk: Defendant's Exhibit AF in evidence.

(Thereupon deposit slips were received in evidence and marked defendant's Exhibit AF.)

Q. (By Mr. Hagerty): At this time, Mr. Olender, I show you three deposit slips, savings account deposit slips on the Bank of America in Oakland and ask you if you can identify them?

A. They are the opening deposit slips for the

(Testimony of Milton H. Olender.)

three trustee accounts in my name for my three children.

Mr. Hagerty: At this time, if your Honor please, I would like to offer these in evidence.

Mr. Shelton: May I see them first?

Mr. Hagerty: Yes. I had already shown them to the Government counsel.

Mr. Shelton: No objection, your Honor.

The Court: They may be marked.

The Clerk: Defendant's Exhibit AG in evidence.

(Thereupon deposits slips were received in evidence and marked defendant's Exhibit AG.)

Q. (By Mr. Hagerty): Now, is it a fair statement, Mr. Olender, to say that these deposit slips represent deposits of \$5,000 each in trustee accounts for your three children whose [795] names are Audrey Elaine Olender, your stepson, Richard Raymond Busby, and your son, James Harold Olender?

A. Yes, sir.

Q. That represents a total deposit of \$15,000?

A. That is correct.

Q. Where did you get that money?

A. Out of my safe deposit box.

Q. The date of the deposit, in each instance, was November 20, 1945? A. I believe so.

Q. Now, Mr. Olender, you spoke of receiving rents from the Fresno property. At what period of the year would you generally receive these sums?

A. Usually, I believe, in almost every instance,

(Testimony of Milton H. Olender.)

with perhaps one or two exceptions, the beginning of the next year, the early part of January.

Q. Now, I show you Government's Exhibits No. 1 and No. 9, which are your individual income tax returns for the years 1945 and 1944, and ask you if there is any indication thereon where you report this rental income from the Fresno properties?

A. Well, on the 1945 return, which I have, I show a total income to me, less depreciation and taxes, of \$1,150.11.

Q. And that is for what period?

A. The year 1945 to January 1st, 1946.

Q. And then will you tell us whether you have a related [796] item in the earlier return, the one for 1944, Government Exhibit No. 1, I believe it is, or No. 9?

A. Yes, in 1944 I show a net return after depreciation and taxes of \$1,232.46.

Q. In what form did you receive these moneys?

A. Nearly always—I am not positive of this—but nearly always in cash. There may have been a cashier's check in there at one time or another. I am not sure.

Q. And then what would you do with these moneys?

A. Well, I would either deposit it in my personal account—to the best of my recollection I did not. I put it in my safe deposit box.

Q. As cash? A. As cash, yes.

Q. Now, during the years 1944 and '45, did you receive any gifts from your mother?

(Testimony of Milton H. Olender.)

A. I believe I did. They are scheduled in Mr. Ringo's net worth statement.

Q. In what form were they?

A. They were usually currency and perhaps an occasional cashier's check.

Q. And in the event it was a cashier's check, what would you do with it?

A. I would have cashed it and put the funds in my safe deposit box. [797]

Q. Now, in these rents that you spoke of, was that a gross amount plus the—that is, including the depreciation item?

A. Well, that figure which I quoted was not my actual income. The money I received actually—I received that \$1,100 plus some \$500 of depreciation, which would make my total about \$1,600 or \$1,700.

Q. Would that be true in each year?

A. Yes, in every year.

Q. Now, you have outlined to us your sources of income in this period of time, that is, from your business, from the rentals, and the gifts and these other items, stocks, gifts from your mother, and your cash in the safe deposit box. Did you have any other sources of income?

A. None whatsoever.

Q. Now, you have testified, I believe, earlier, that in the case of the sales of some of these suits, that is, through Mr. Leavy and also the Lerman sale, you received certain amounts of cash; is that true?

A. Yes.

Q. What did you do with that cash?

(Testimony of Milton H. Olender.)

A. I believe that was deposited—part of it—of course the Lerman transaction—in my business and ultimately the Saraga money in my personal account.

Q. In this period of time if you had any cash or were handling any cash transaction, where would you get the cash? [798]

A. Well, it either had to come out of my personal account or out of my safe deposit box.

Q. How about your store? Did you ever draw cash from the store?

A. On my store account also, yes.

Q. Now, directing your attention to the time—some time in 1944, probably April or May, when you made a trip to San Antonio, Texas. You have stated hitherto that you withdrew certain funds from your safe deposit box before you put Judge Monroe Friedman's name on that box as a co-tenant and before you made the count of the funds with him. Do you have in mind how much you withdrew at that time?

A. Well, it was between five and ten thousand dollars. I am not sure of the sum.

Q. Now, you have also stated that that contemplated business transaction in San Antonio did not materialize? A. That's correct.

Q. What did you do with that money?

A. When I returned and after Mr. Friedman had checked the cash with me in the box, I placed it back in the box.

Q. In other words, would it be a fair statement

(Testimony of Milton H. Olender.)

that you used your safe deposit box as a depository for your personal funds as contrasted with your store funds? A. That's correct.

Q. That you had in the business? [799]

A. Yes.

Q. Well, then, to summarize, Mr. Olender, you stated that you had the income from your business, and an income from securities, and rentals and so forth, and gifts from your mother and such transactions. Will you tell us, trace funds for us? What would you do with the funds? Can you hear me?

A. Not very well.

Q. Let me withdraw and let me say this: The cash funds you received you have testified were put in your safety deposit box, is that right?

A. That is correct.

Q. Then, of course, you had certain amounts of cash in your business, is that true?

A. That is correct.

Q. And after these funds had arrived in your box or your business that was the sole source of your cash funds and/or business transactions; is that right? A. That is right.

Q. During the war years, Mr. Olender, did you have the same sources of supply of merchandise as you had had in the pre-war years?

Mr. Shelton: If your Honor please, that is objected to as, first, immaterial, and, second, meaningless, if true, because it goes back into a period before this case and unrelated [800] to this case.

Mr. Hagerty: It is preliminary, your Honor, and

(Testimony of Milton H. Olender.)

ties in with cross-examination that was had of this defendant by Government counsel which will be apparently in the next question.

The Court: All right, overruled.

A. Well, I had difficulty, as you know, buying sailor suits and I bought them wherever I could. I found many suppliers that would sell me ten, fifteen or twenty at a time, and I believe that in the course of this period that I had between five and ten such sources. Some of them were a single transaction, some of them were as many as eight, ten or twelve transactions.

Q. On cross-examination the other day Mr. Drewes asked you if you knew a man by the name of Asman? A. I believe he did.

Q. Did you know him?

A. When Mr. Drewes asked me that question, I believe my answer was, "The name doesn't register." But in checking through our bills a couple of days ago at the request of the Government, I discovered one invoice which has a notation on it, "Joe Asman, paid by check," such and such a number, for about one hundred suits. Mr. Asman was in ill health and was going out of business and came to me, and I purchased those suits from him. That was the only transaction I have [801] ever had with Mr. Asman before or since in my recollection. I might have had more, but Mr. Asman died of his illness a short time thereafter.

Q. When did you learn that?

A. Yesterday.

(Testimony of Milton H. Olender.)

Q. Why did you learn it?

A. I asked Mike, who testified the other day, if he knew what had happened. Asman was a competitor of Mike's and he checked up and found out the man had passed away about 1946 or '7.

Q. Why did you make the inquiry at all?

Mr. Drewes: I will object to further testimony on this point. It is immaterial.

Mr. Hagerty: I just wanted to point it out.

The Court: I think we understand. The gentleman passed away, sold his merchandise.

Q. (By Mr. Hagerty): Had you ever known Asman before this single transaction? A. No.

Q. Did you know anything about his ill health?

A. Not until he came to me.

Q. In your dealings with Mr. Ringo I believe you gave certain information upon a proposed net worth—or an attempted net worth statement was compiled? A. That is correct. [802]

Q. Did you give him information about a purchase of bonds in the year 1944 in the approximate amount of \$8,000? A. I believe that I did.

Q. Do you recall where those funds came from?

A. They came out of my safe deposit box.

Q. You have testified here about certain purchases from a man by the name of Barney in Los Angeles? A. Yes, sir.

Q. I believe we have certain exhibits in evidence in connection therewith. Where did you get the funds for those purchases?

A. I believe out of my safe deposit box.

(Testimony of Milton H. Olender.)

Q. Now, you testified you made a purchase of bonds, approximately \$20,000 worth for your mother?

A. Yes, sir.

Q. Did you ever report as income on your returns at any time the interest on those bonds?

A. I believe I did in the year 1947.

Q. Who reported the interest as income in 1946, if you know?

A. My mother.

Q. Why did you report it differently in 1947?

A. Well, I had collected that interest in Oakland and my mother told me to keep it, said, "You can have it," and I assumed—evidently wrongly, now—that that money was to [803] be reported by the person who got it, not the person who had the bonds, and I received the money, deposited it, and the records show I deposited it in my personal account so I included it in my interest instead of hers.

Q. You have testified, and I believe there is evidence on the Government's part of your purchase of certain cashier's checks from the Bank of America in the month of May, 1945—one for \$3,000, another for \$3,500, another for \$3,500, another, I believe, for \$5,000. Where would those funds have come from for the purchase of those checks?

A. They must have come from the safety deposit box.

Mr. Hagerty: I believe we have covered, your Honor, every element that will be introduced through the accountant. I may have some further questions after further cross-examination.

(Testimony of Milton H. Olender.)

The Court: Do you wish to reserve your cross-examination?

Mr. Shelton: No, your Honor, I was going to ask if this would be a convenient time for the recess before I started, whether your Honor wanted to take a recess or not.

The Court: We resumed about 10:30. I thought we might run along until about 11:30, if agreeable to the Jury.

Mr. Shelton: All right.

Recross-Examination

By Mr. Shelton:

Q. Mr. Olender, you have in mind this schedule, have you not, which was identified by your [804] accountant, Mr. Hellman, which attempts to account for certain alleged cash transactions? You have that in mind, have you not, Mr. Olender?

A. I believe so.

Q. Have you examined it?

A. Yes, I have.

Q. Will you state to what extent the information contained on that sheet refers, consists of information which you furnished your counsel, which of the items on this sheet which I described were information you gave your counsel and the accountant to prepare this sheet?

Mr. Hagerty: Just a minute, I will object at this time, your Honor, on this ground: That it is improper cross-examination. The defendant has

(Testimony of Milton H. Olender.)

been examined at considerable length on this particular chart. The charts that the groundwork was laid now through his direct testimony and his direct examination, is for the purpose of the introduction of the further studies of the accountant and of additional schedules. I think that there has been ample cross-examination of this defendant on this particular schedule.

The Court: Overruled.

Q. (By Mr. Shelton): Will you answer the question, Mr. Olender?

A. I don't remember it now.

Mr. Shelton: Will you read the question?

(Question read by Reporter.) [805]

Mr. Hagerty: Just a minute. I will make a further objection, your Honor, on this ground: This chart is quite an involved and complex one. It is difficult even for an accountant to trace all things through satisfactorily to the ordinary person, and I would request that Mr. Shelton direct specific questions as to specific items on this chart rather than a generalization such as he has asked for.

The Court: Overruled.

A. Well, many of these items, Mr. Shelton, were dug up by the accountant through examination of my books. I don't know which items I gave him and which he found in the books. They are in the books, many of them, or in my personal account.

Q. (By Mr. Shelton): Would you go down the chart, Mr. Olender, and state to the best of your

(Testimony of Milton H. Olender.)

belief which of the items you gave to your accountant? A. I wouldn't know, Mr. Shelton.

Q. In the nature of things isn't there a considerable part of this that would have to be based on your testimony?

A. That is correct, but I can't tell you which specific item I gave him and which one he dug up.

Q. All right. Referring now specifically, Mr. Olender, to this \$20,550 figure which appears on the chart, will you state the source of the funds involved in that item?

A. Came from my safety deposit box.

Q. Will you state on how many occasions you went to your [806] safety deposit box to get that money? A. I believe on two.

Q. You believe on two occasions?

A. Yes, sir.

Q. Perhaps it would refresh your recollection if I could show you the cashier's checks and the applications therefor at the time of this transaction. I show you here, Mr. Olender, two photostatic copies—strike that—photostatic copies of three applications for cashier's checks and nine cashier's checks.

Mr. Hagerty: Mr. Shelton, I don't like to interrupt, but can we see those, too?

Mr. Shelton: I believe you have seen them before, counsel, but you certainly may.

Mr. Hagerty: Are they in evidence?

Mr. Shelton: They were shown to Mr. Olender by Mr. Drewes, and I thought you had seen them.

(Testimony of Milton H. Olender.)

(Thereupon the documents above referred to were handed to Mr. Hagerty.)

Q. (By Mr. Shelton): Is it your testimony then, Mr. Olender, that there were two occasions on which you went to the safe deposit box to get that money? A. Could have been three.

Q. Was it at least two?

A. I believe so. [807]

Q. Who, if anyone, went to the safe deposit box on those two or three occasions when you went to the box to get that money?

A. I wouldn't remember now.

Q. When you got the money from your safe deposit box on those occasions where did you take it?

A. Upstairs to the counter that you buy cashier's checks at.

Mr. Hagerty: If your Honor please, I will object to this again as improper cross-examination on the grounds this was all gone into when these checks were first examined.

The Court: Overruled.

Q. (By Mr. Shelton): What did you do with the money when you got it upstairs, Mr. Olender?

A. I believe I gave it to the gentleman in that booth.

Q. Was that a gentleman in the Bank of America department which sold cashier's checks?

A. I believe so.

Q. Did anyone accompany you upstairs to purchase those cashier's checks?

(Testimony of Milton H. Olender.)

A. I don't believe so.

Q. To the best of your recollection you were by yourself?

A. I believe so, I am not sure.

Q. State whether or not you had had previous conversations with Mr. Lewis Leavy as to the form in which those cashier's [808] checks were to be made out?

A. I don't remember whether it was conversations or letters.

Q. In any event, is it correct to state that Mr. Leavy had advised you by letter or by word of mouth that those cashier's checks should be made out to Mr. Goodman?

A. I believe so.

Q. And that applies to the whole series of nine, does it?

A. I believe it does.

Q. When you got those cashier's checks—and I will ask you to look and see if some of them weren't purchased on January 10th and some on January 22nd—

A. They were, yes, sir.

Q. When you got those cashier's checks what did you do with them?

A. To the best of my knowledge—I am not sure of this—I believe that I mailed them to Mr. Leavy in New York. I am not sure.

Q. Is there anything that would refresh your recollection on that?

A. I don't know of it.

Q. Is there any doubt in your mind at all, Mr. Olender, that you bought these nine cashier's checks payable to Mr. Leavy?

A. Not Mr. Leavy. [809]

Q. I mean Mr. Goodman, at the request of Mr.

(Testimony of Milton H. Olender.)

Leavy, and that you transmitted those cashier's checks to Mr. Leavy either through the mail or directly?

A. I am not certain. I believe that is what happened.

Q. Is there anything else which could have happened? A. I don't know.

Q. Well, this was a situation where you were handling the transactions yourself, were you not?

A. Yes, sir.

Q. And there was no one else involved in getting the money out of the box and taking the money up to the bank and getting the cashier's checks and transmitting them except you, was there?

A. Not that I know of.

Q. So that you were the sole person handling these transactions, were you not?

A. I believe I was.

Q. And I understood your testimony further to be that when the merchandise was received from Goodman which was purchased with these nine cashier's checks that it did not at that time go on your records? A. That is correct.

Q. So that that was something out of the ordinary, was it not, which would fix the matter in your memory? A. Not necessarily, no. [810]

Q. Well, did you customarily carry on transactions which didn't go into your records?

A. Many of them when merchandise was returned. I personally was handling earlier books, and if something came in and I knew I didn't want

(Testimony of Milton H. Olender.)

it I made no entry of the merchandise, there was no payment whatsoever made and the merchandise would be returned and I would have the invoice and the credit but not—but no entry on the books.

Q. Isn't it true, Mr. Olender, that in these short-age periods we are talking about now, 1944 and '45, you usually had to pay cash in advance?

A. Not always.

Q. Wasn't that the regular rule?

A. No, sir.

Q. Were you able to buy merchandise regularly without making any payment on it?

A. Yes, sir.

Q. In any event, this was a transaction in a very considerable amount which did not go in your books, was it not, at that time? A. That is correct.

Q. Mr. Olender, I will call your attention to the date of July 14th, 1947, and ask you whether or not you recall an occasion when you went to the office of the Internal Revenue Bureau to make a sworn statement at which time there were [811] present yourself, then special agent Medbury Blanchard, who has testified on this stand, former agent Metlar, who is now dead, and a secretary, Miss Alice Reese. Do you recall that occasion?

A. I remember I went there on an occasion, yes.

Q. Will you state whether or not on that occasion you did make a sworn statement in question and answer form?

A. I made a statement in question and answer

(Testimony of Milton H. Olender.)

form which was returned to me and with many inaccuracies and which I did not sign.

Mr. Shelton: I ask that the statement on inaccuracies be stricken, if your Honor please. The statement, I think can be explained, but I think that is a self-serving statement.

Q. (By Mr. Shelton): You then did make that statement under oath, Mr. Olender?

A. I did.

Mr. Hagerty: We pray the indulgence of the Court to examine this. We have never seen it before.

The Court: We will take a short recess, ladies and gentlemen. Same admonition to you.

(Short recess.)

Q. (By Mr. Shelton): Mr. Olender, you had the opportunity to look at this statement during the recess, did you not? A. Yes, sir.

Q. I will ask you whether on that occasion you were not [812] asked the following questions in part—

Mr. Hagerty: If your Honor please, may I ask him a couple of questions on voir dire in reference to this statement?

The Court: Yes.

Q. (By Mr. Hagerty): Mr. Olender, at the taking of this statement were you represented by counsel? A. I was not.

Q. At the time this statement was taken did you have an opportunity before you went over to the chambers of the internal revenue to make a review

(Testimony of Milton H. Olender.)

and examination and refresh your memory from your books? A. I did not.

Q. Subsequently were you given an opportunity to examine this statement and sign it?

A. Yes, I was.

Q. Did you sign it? A. I did not.

Mr. Hagerty: No further questions.

Q. (By Mr. Shelton): Mr. Olender, I will ask you if, in the course of that statement you were not asked the following question and did not give the following answer, and if the Court and Jury please, this is the second question on the statement.

“Q. At this time it becomes my duty to advise you [813] that under the constitution, you are not required to incriminate yourself, and to inform you that anything you may say, and any documents you may produce at this hearing, can be used against you in any proceeding which may hereafter be undertaken by the Government. Do you understand that? A. Yes, I do.”

Now, Mr. Olender, were you asked that question and did you give that answer?

A. I presume I did.

Q. I will ask you if you were not asked the following questions and did not also give the following answers as indicated:

“Q. Mr. Olender, in the year 1944 did you have occasion to do any business with a George Goodman? A. Not directly.

“Q. You did not have any relationship with him? A. Not that I remember.

(Testimony of Milton H. Olender.)

“Q. Not that you remember?”

“A. Not that I remember.

“Q. Did your store have any?”

“A. Just one invoice, whether it was with him or not, I do not remember how that deal came about.”

Were you asked those questions and did you give those answers? [814] A. I believe I did.

Q. I will ask you if you were asked the further question and gave the answer as follows:

“Q. I show you a check dated September 25, drawn on the Bank of America National Trust & Savings Association, Number 1806, and ask you whether that is the check drawn by you in payment of that invoice? A. It is.”

One further question and answer:

“Q. Is that the only money that you paid to Mr. Goodman?”

“A. The only money that I know of.”

Now, Mr. Olender, I will ask you whether or not that first question of those two was not related to the \$1,380 Goodman transaction which is on your books and which has been testified to on this trial?

A. It could be, I don't remember it.

Q. I will ask you further if you were not asked the following question after some transactions had been outlined.

“Q. But otherwise than the foregoing transaction”—and it is singular, evidently referring to the \$1,380 transaction,—

(Testimony of Milton H. Olender.)

“you never purchased any other sailor suits or merchandise from Mr. George Goodman? [815]

“A. To the best of my knowledge and belief, no.”

Were you asked that question and did you give that answer? A. I presume I did.

Q. I will ask you if you were asked the following further questions and gave the following further answers:

“Q. Can you tell me when those transactions were had?

“A. I do not remember. They were in February of 1944, I believe.

“Q. You had no transaction of any kind?

“A. No record of any such transaction.

“Q. Your records do not disclose any such transactions? A. No.

“Q. This was in 1944, I see. Well now, Mr. Olender, I think I would like to show you some things. Now, Mr. Olender, I show you an application dated January 10, 1944, signed with your signature, apparently 1026 Broadway, and ask you whether you purchased the cashier's check in the Bank of America National Trust Association, main branch, which I now show you photostat copies of, together with the applications.

“A. I have no record of those whatsoever.

“Q. It is your signature, isn't it? You will [816] note, Mr. Olender, that they were purchased for cash, and here I show you again this application—

(Testimony of Milton H. Olender.)

here—'cash'—Olender, 1026 Broadway. Cash—see 73,962; this is 73,962.

"Mr. Metlar: Application numbers.

"A. I have no record of them whatsoever, nor do I remember them. That 6750 is one Mr. Goodman asked me about, and I have no record of it."

Did you give those answers to those questions?

A. I believe I did.

Q. Mr. Olender, I will ask you if you were also asked the following questions and gave the following answers:

"Q. Now, Mr. Olender, have you any explanation whatever to make?

"A. The single transaction with Mr. Goodman for \$1,380 and the single transaction with Seagoing evidenced by the invoice No. 9662 constitute the only completed transactions I have record of. If there were any other transactions, they were never complete. When I say "completed," they were such as the check I showed you for \$27,000, check for \$50,000 which were returned to me.

"Q. The checks which I have shown you were apparently all paid into the account of Mr. Goodman, or the Seagoing Uniform Company. I'll show it to you, [817] Seagoing Uniform, Seagoing Uniform, George Goodman, Seagoing Uniform, Seagoing Uniform, Seagoing Uniform, Lafayette Bank, Seagoing Uniform. Same thing here.

"A. I have no recollection of having paid those checks, or purchased them, or of having received

(Testimony of Milton H. Olender.)

merchandise for them. If I got merchandise, I didn't keep it."

Were you asked those questions and did you give those answers? A. I believe I was.

Q. I will ask you if you were asked the further questions and gave the further answers.

"Q. The transactions which you speak of appeared in your bank account in the Bank of America. They were withdrawals, withdrawn on that account. Did you ever draw any checks covering these sums?

"A. I have no recollection now. I would have to check my books; during the early years I had many cashier's checks drawn—many of them. They are on my records, as far as I know, because in those days I had no credit and had to send the checks in advance.

"Q. In 1944? A. In 1944.

"Q. This is 1944 we are speaking of. [818]

"A. I sent many cashier's checks in those days."

Mr. Olender, I will further ask you if it isn't true that about a week before you gave this sworn statement from which I have read Mr. Medbury Blanchard came to your store in Oakland?

A. I wouldn't know when he came. He came there before that affidavit.

Q. He came there shortly before you gave this sworn statement, did he not?

A. I wouldn't know how much before, but he came there before.

Q. Was it rather shortly before?

(Testimony of Milton H. Olender.)

A. I wouldn't know that.

Q. I will ask you whether or not at the time that Mr. Blanchard came to your store he did not tell you that he was investigating transactions of George Goodman?

A. I believe he did.

Q. I will ask you whether or not it isn't also a fact that not very long before this sworn statement was given, Mr. George Goodman came to San Francisco?

A. I don't know when he came. He came before Mr. Blanchard came to see me.

Q. To refresh your recollection I will ask you whether or not it wasn't about two or three months before?

A. It could have been two, three or six months before. [819]

Q. And I will ask you whether or not at that time Mr. Goodman did not ask you concerning some of the same transactions which Mr. Blanchard later asked about?

A. He did not.

Q. Mr. Olender, I will recall to your recollection the testimony you gave about the money that you assert you took to Texas in the amount of \$5,000 or \$10,000 and, as I recall your testimony, you stated that you got that money out of the vault before you and Mr. Friedman counted what was left in the vault late in April?

A. That is correct.

Q. And I will ask you whether or not that money, which you state was drawn out on that occasion, was drawn out at the same time on the

(Testimony of Milton H. Olender.)

same trip as Mr. Friedman went with you or whether it was drawn out on an earlier trip?

A. Mr. Friedman did not go with me.

Q. Well, do I understand then that you had already drawn out the five to ten thousand dollars on an earlier trip before the time in April when you and Mr. Friedman inventoried the box?

A. You mean the trip to the box?

Q. The trip to the box.

A. Yes, sir, I drew that out before Mr. Friedman went in there.

Q. So that you made two separate entries to the box, [820] did you, one to draw out the five to ten thousand dollars, according to your statement, and the other with Mr. Friedman wherein the remaining cash was inventoried and the box was changed to your name and his?

A. That's correct.

Q. Now, Mr. Olender, I would like to ask you some questions about these transactions that have been testified to, the purchase of the \$20,550 from Goodman, and when that merchandise was disposed of—One further question with respect to that entry into the box, Mr. Olender. Was the entry with Mr. Friedman on the same day as the entry to draw the five or ten thousand dollars?

A. No, sir; it was not.

Q. About how long prior to the Friedman entry was the entry when you drew the five or ten thousand dollars?

A. I wouldn't know that, Mr. Shelton.

Q. To the best of your recollection?

(Testimony of Milton H. Olender.)

A. I haven't any recollection.

The Court: When you speak of the "Friedman entry," counsel, you speak of the entry when Monroe Friedman accompanied this defendant to the box, is that right?

Mr. Shelton: Yes, your Honor, concerning which the affidavit has been——

The Court: Not any independent entry on the part of Monroe Friedman? [821]

Mr. Shelton: This witness testified, as I understand it——

The Court: Is that right?

Mr. Shelton: Yes.

The Court: I just want to clarify it.

Mr. Shelton: Yes, your Honor.

Q. Mr. Olender, I believe there has been testimony at this trial, to take this figure of \$20,550, the money drawn out from the safe deposit box on those two or three entries, and on the assumption that \$25 was the price for suits paid to George Goodman, the number of suits bought has been reconstructed as 822, is that correct?

A. I believe it is.

Q. And has there also been testimony in this trial as to the defense contention as to how many of those suits remained on hand at December 31, 1945, and December 31, 1946?

A. I believe there was.

Mr. Hagerty: If your Honor please, again I repeat my objection, that this is far afield of proper

(Testimony of Milton H. Olender.)

cross-examination. None of this was gone into on the direct examination.

The Court: Overruled.

Q. (By Mr. Shelton): How many of these suits remained on hand with you or your store on December 31, 1946, Mr. Olender?

A. There were 480 sold. I don't remember the exact number [822] now. It's in the inventory.

Q. Shall I then subtract 480 suits from 822 suits? A. I believe so.

Q. Now that leaves a figure of 342 suits, does it not? A. 342.

Q. I will ask you whether or not it is your testimony that those 342 suits were on hand at the Army & Navy Store at December 31, 1946?

A. All except twenty of them.

Q. Shall I then subtract twenty from that?

A. Yes.

Mr. Lewis: Your Honor, I think Mr. Shelton is confusing the years. The year was '45 instead of '46, according to the testimony in the record.

Mr. Shelton: If I am wrong, the defendant can correct me, your Honor.

Q. I will ask you whether or not, Mr. Olender, that that figure of 322 suits is the number of suits on hand at December 31, 1946? A. No, sir.

Q. When was that on hand?

A. I believe December 31, 1945.

Q. December 31, 1945, 322 suits. All right, sir. Well, I will ask you then whether it is your testimony that the 500 suits, which represent the dif-

(Testimony of Milton H. Olender.)

ference between 822 suits [823] and 322 suits, were also sold during the year 1945?

A. Your figure isn't correct, Mr. Shelton.

Q. Would you correct it, Mr. Olender?

A. It's 200, 280, and 20. That is correct, Mr. Shelton.

Q. We will run an addition on that, Mr. Olender, just to see that it does tally. By adding 280 and 200, and 20, I get a total of 500. Now I will ask you whether or not it is your testimony that those 500 suits were or were not all sold by you or the Army & Navy Store during the year 1945?

A. Well, they were sold through Mr. Leavy, the 480.

Q. Will you answer my question as to whether they were disposed of by you or the store either directly or indirectly during the calendar year, 1945?

A. I believe they were.

Q. All right. Your testimony then that these 500 suits were all disposed of during the calendar year 1945, either directly or indirectly, is that your testimony?

A. I believe so.

Q. And what does that 500 consist of, what are these respective items of 280, 200, and 20?

A. 280 are suits sold by Mr. Leavy individually, and the 200 suits are the suits sold to Mr. Lerman at one time and the 20 suits are suits sold during the process of my business at retail during 1945.

Q. So that all—it is your testimony that all those 500 [824] suits were sold during the year 1945?

A. I believe so.

(Testimony of Milton H. Olender.)

Q. To the best of your knowledge and belief?

A. Yes, sir.

Q. I will ask you whether or not in your income tax returns for the years 1944 and 1945 you reported any inventory other than the inventory of the Army & Navy Store? Did you report any individual inventory of your own, apart from such inventory as was on hand in the Army & Navy Store?

A. I don't believe I did.

Q. To the best of your recollection then, and the particular inventory I have reference to is of December 31, 1944, inventory, that inventory as shown on both the 1944 and 1945 income tax returns was the inventory of the store only?

A. That's correct.

Mr. Shelton: May I have Exhibits 1 and 2, Mr. Clerk?

Q. (By Mr. Shelton): Mr. Olender, I show you Government Exhibit No. 1, the 1945 income tax return of Milton H. Olender, and ask you if you will read from the business schedule of the Army & Navy Store the inventory as of December 31, 1944, which would be the opening inventory?

A. That would be the number 1——

Q. It would be——

A. Would you show me that, here, Mr. Shelton?

Q. It would be the opening inventory. Yes. [825]

A. \$85011.26.

Q. And I will ask you whether or not that didn't represent an inventory which you yourself took and entered on sheets?

A. Yes, it did.

(Testimony of Milton H. Olender.)

Q. Which are in evidence in this case?

A. Yes, sir.

Q. And I will ask you whether or not any of the 500 suits which have been computed here on the board appear in that inventory?

A. I don't believe they do.

Q. And do they appear any place on the return?

A. They do not, as far as I know.

Q. And I will ask you whether or not that tax return was prepared under the penalties of perjury? Does it so state on the tax form?

A. All returns are filed so.

Q. So that would include that return?

A. Yes, sir.

Q. And I will ask you whether or not during the course of this investigation you told any of the Government agents or stated to them or gave them any indication as to any error in that opening inventory figure for the year 1945, that is the figure for December 31, 1944?

A. I do not believe there is an error in that figure.

Q. Well, did you not testify, Mr. Olender, that that [826] figure did not include the 500 suits which we have here on the board?

A. It didn't include any of them.

Q. Was that number of suits reported any place else on that return? A. Not that I know of.

Q. So that inventory figure leaves out those 500 suits? A. Yes, sir.

(Testimony of Milton H. Olender.)

Q. And all of those suits were sold during the succeeding year, that is, the year 1945?

A. Yes, sir.

Q. And has it been your testimony that those suits were sold for \$25 apiece?

A. That is correct, sir.

Q. So that you have a figure there of \$12,500 which represents income received, according to your statement, in 1945, from inventory which was not reported in any place on the return for the closing 1944 inventory on that return?

A. That is correct, I believe.

Q. So that you say that goods there that sold in the succeeding year, that is the year 1945, for \$12,500 were valued at zero as of December 31, 1944?

A. They were not taken into the inventory at all.

Q. All right, sir. Mr. Olender, I will show you 1946 return—I will withdraw that, Mr. Olender, and show you the [827] 1944 income tax return, and ask you whether or not the inventory figure as of December 31, 1944, is not the same as of December 31, 1944, figure shown on the 1945 return?

A. Yes, sir.

Q. And the 1944 return then ties in with the 1945 return and shows the same figure which, as I understand it, includes none of this merchandise which is referred to on the board and never at any time did you tell the agents that there should have been a change made in that inventory?

A. I don't remember what I told the agents.

(Testimony of Milton H. Olender.)

Q. So far as you recall did you ever tell the agents that that inventory should be changed or corrected or that there was any error in it?

A. I don't remember ever telling them anything about it.

Mr. Shelton: I will ask defense counsel, through the Court, if they can produce the 1944 and 1945 California income tax returns of Milton H. Olender in connection with the inventory figures that are here testified to.

Mr. Lewis: We don't have them.

The Witness: If they haven't, I have. I will produce them, yes, sir.

Mr. Shelton: All right.

Q. (By Mr. Shelton): Now, Mr. Olender, there has been testimony in this case concerning two Goodman purchases. The first Goodman purchase, according to your testimony, in [828] the amount of \$20,550 represented by the eight cashier's checks; the other purchase, also of sailor suits, from Goodman in the amount of \$1,380. Are you familiar with that \$1,380 transaction? A. I know of it, yes.

Q. I will ask you whether or not the sailor suits involved in the two purchases, and disregarding the sizes, were the same type of sailor suits?

A. I wouldn't remember that now.

Q. You don't remember whether they were the same suits or not? A. No, I don't.

Q. Mr. Olender, I believe that you have testified in response to direct examination this morning by Mr. Hagerty that this figure from Barney trans-

(Testimony of Milton H. Olender.)

action represents money which came out of your safe deposit box, is that correct?

A. I believe it is correct.

Q. That money to purchase those two cashier checks came out of your safe deposit box?

A. I believe they did, yes, sir.

Q. I will show you the revised cash statement as produced by the Government this morning and ask you if that figure of \$2,160.03 is the cash item which it was your testimony this morning came out of your safe deposit box to buy those two cashier's checks to be sent to Barney? [829]

A. I believe they were, yes, sir.

The Court: One correction. The revised statements as produced by the defendant.

Mr. Shelton: Yes, your Honor.

The Court: You said by the Government.

Mr. Shelton: Thank you, your Honor.

The Court: We will take the noon recess, ladies and gentlemen—if this be a convenient time, counsel—and the same admonition not to discuss the case or form an opinion until the matter is submitted to you.

(Thereupon an adjournment was taken until two o'clock p.m. this date.) [830]

September 30, 1952, 2:00 P.M.

MILTON H. OLENDER

resumed the stand, and having been previously duly sworn, testified further as follows:

Recross-Examination
(Resumed)

By Mr. Shelton:

If the Court please, the Government will at this time offer in evidence as its exhibit next in order the sworn statement of Milton Olender dated July 14, 1947, portions of which were read this morning.

Mr. Hagerty: Well, we will object to it, your Honor, on the grounds it is incompetent, irrelevant and immaterial. It has never been proved by the defendant, that is, in its entirety. There are obvious corrections in it. If that is the same copy shown to me, there were pasted transcriptions into it. It is not the best evidence, your Honor, and we object to it.

The Court: It may be marked for identification at this time.

The Clerk: U. S. Exhibit No. 48 for identification only.

(Thereupon the described statement of the defendant was marked U. S. Exhibit No. 48 for identification only.)

The Court: You already posed to the witness the several questions you desired? [831]

Mr. Shelton: Yes, your Honor.

(Testimony of Milton H. Olender.)

The Court: It may be marked for identification.

Q. (By Mr. Shelton): Mr. Olender, I believe you testified on this trial that at the end of the year 1947 revenue agent Root who is sitting here at the Government counsel table, came to see you with respect to an investigation of your returns and that you asked him to come back in the first part of 1948?

A. I am not sure. I believe that is correct.

Q. All right, sir. Now directing your attention to the date January 13, 1948, I ask you whether or not it isn't true that on or about that date revenue agent Root held a conference with you in your office at the Army & Navy Store?

A. I believe he did.

Q. I will ask you whether or not on that occasion internal revenue agent Root didn't tell you that there were Express Company records which revealed that at least part of this \$20,550 of Goodman purchases that have been previously referred by you were shipped to you at your place of business?

A. I have no recollection of that.

Q. I will ask you whether or not it is also a fact that on that occasion in your office you told revenue agent Root you were unable to recall the circumstances of the transactions with Mr. Goodman?

A. I don't remember that, sir. [832]

Q. Now, Mr. Olender, just before the recess we were discussing the matter of the item of the two Barney cashier's checks. You recall that, that the two cashier checks that you purchased and were

(Testimony of Milton H. Olender.)

sent to Los Angeles, I believe, to pay for some merchandise?

A. Either sent or delivered in person to his brother. I don't remember which.

Q. In any event, they were—— A. Yes.

Q. ——transmitted down there in one way or another? A. That's right.

Q. Is it your testimony that the cash to purchase those cashier's checks did or did not come out of your safe deposit box?

A. To the best of my knowledge they came out of the safe deposit box.

Q. Now, Mr. Olender, I will invite your attention to pages 619 and 620 of the transcript to the following testimony when you were on the stand:

“Q. (By Mr. Drewes): With respect to these two checks which are defendant's Exhibit Z, one of them marked \$2,484.26, dated December, 1944, and one in the amount of \$1,911.77, dated November the 9th, 1944, Mr. Olender, is it your testimony that you purchased these at the Bank of [833] America? A. Yes, sir.

“Q. And how did you pay for them?

“A. With cash.

“Q. And from what sources did the cash come?

“A. I don't remember now, Mr. Drewes.

“Q. Do you have any record which would indicate the source? A. No.

“Q. The source of cash? A. I haven't.

“Q. It was stated by your counsel in response to a question asked of him by the Court that this

(Testimony of Milton H. Olender.)

particular transaction was discovered by your accountants after the stipulation was entered into, is that correct?

“A. I believe so. I didn’t work with the accountants. They did all of the work.

“Q. You recall when?

“A. Oh, this last week—probably Sunday or Monday. Just the last few days.

“Q. Did your accountant ask from what source this cash came? A. I don’t remember.”

Did you give those answers to those questions, Mr. Olender? A. I must have. [834]

Mr. Hagerty: We will stipulate that he did. That’s the record, your Honor.

But again I wish to raise an objection to this whole line of cross-examination as being improper. It is not within the scope of the examination that we put the defendant on the stand for this morning and this is simply an attempt to rehash cross-examination that has already been gone into.

The Court: Overruled. All these matters, as I view it, bear upon the cash transactions.

Mr. Hagerty: On the cash position of the defendant.

The Court: And the source thereof.

Q. (By Mr. Shelton): Mr. Olender, I will ask you if this morning there were not identified by you and introduced into evidence three deposit slips of the Olender-Elkus bank account?

A. Yes, sir.

Q. And that is defense Exhibit AF, is it not?

(Testimony of Milton H. Olender.)

A. Yes, sir.

Q. Mr. Olender, I have here what purports to be a transcript, a full transcript of the Olender-Elkus bank account. It is a photostatic copy which the Government obtained from working papers then in the possession of Mr. Ringo, at one time your accountant, and I would like to ask you about one particular entry in here.

Mr. Hagerty: For the purposes of the record, if your Honor [835] please, and so we don't lose any of our position, we again object to any information or any cross-examination or any introduction into the record of any communication from the defendant to Mr. Ringo and vice versa that the Government is now asking.

The Court: And your objection is overruled.

Q. (By Mr. Shelton): Mr. Olender, I will call your attention there to a deposit in the amount of \$1,000 under date of May the 12th, 1945, the name besides that looks to me like Fred *DeLew*, and I will ask you what that transaction was?

A. Yes, sir. Mr. Fred DeLew, who I will produce in this Court—

Mr. Hagerty: Just a moment. I will object to this. We haven't seen these records. I would like to see these.

Mr. Shelton: You have the originals, have you not, counsel?

Mr. Hagerty: If you question the integrity of the originals, I would like to see what you are offering as a substitute.

(Testimony of Milton H. Olender.)

Mr. Shelton: We don't question the integrity. They are not in our possession.

If the Court please, Mr. Hagerty seems to question the source of this material, and I wonder if it would be appropriate for me to state the source for the record and his information. [836]

The copies were—the originals of this material were obtained from Mr. Ringo and photostated and those originals were returned to Mr. Ringo. We of the Government were advised that they constituted a part of his working papers in the case. This is a transcript of a bank account, if the Court please.

Mr. Hagerty: Well, they are complex records, your Honor, and I don't seem to recognize them nor does my fellow counsel.

The Court: Maybe the defendant will.

Mr. Hagerty: We have had no chance to examine them, really.

Mr. Shelton: Mr. Hagerty, these records would be available from the bank, would they not, that is a ledger record which would be available from the bank?

The Court: Based upon the representation of the Government counsel I will allow them to be exhibited, to the Court, subject to foundation, of course.

Q. (By Mr. Shelton): Mr. Olender, I will ask you whether or not after looking at this photostat—

A. Might I look at it a little closer? I just glanced. I don't know what's on it.

(Testimony of Milton H. Olender.)

(Document handed to witness.)

Mr. Hagerty: Might I ask the defendant something in reference to those? [837]

The Court: Yes.

Q. (By Mr. Hagerty): Mr. Olender, are those documents in your handwriting?

A. They are not.

Q. Do you recognize them?

A. There is one here that is in my handwriting. I see this top one is——

Q. In reference to the question being asked you as to certain transactions, is that in your handwriting? A. No, sir; no, sir.

Q. Do you recognize the handwriting?

A. I don't know whose it is, no, sir.

Q. (By Mr. Shelton): Mr. Olender, after looking at that photostat of the \$1,000 item in the form of a deposit with the name Fred DeLew, is your recollection refreshed as to the nature of that transaction?

A. I am quite sure that this is what happened, as you will notice on the next entry, Mr. Fred DeLew is a very close personal friend of mine. He wished to buy an automobile. He did not wish to pay cash for the automobile. So he gave me \$1,000 in cash and I wrote out a check to the Canal Motors, which is the next item on the list, and gave him, I believe, a \$100 change. I am not sure. And he purchased a check with that nine hundred—the car

(Testimony of Milton H. Olender.)

with that nine hundred dollars and we have that check. I believe it's in [838] the file here.

Q. I will ask you whether there was any particular purpose for running that transaction through the Olender-Elkus bank account rather than through your personal bank account?

A. No particular reason. It was a personal account also.

Q. But this personal account was jointly with Mr. Elkus?

A. Mr. Elkus had nothing to do with that account.

Q. Mr. Olender, I hand you a copy of what I think can properly be referred to as defense schedule No. 4. That is a schedule or is one of the schedules which was handed this morning to Government counsel just at the opening of the Court.

I will ask you to look at that schedule No. 4 and ask you what differences there are in it from the schedule which was produced here the other day, I think while Mr. Hellman was on the stand, and was distributed to the jury at that time.

A. Well, I don't know what is on either of these schedules actually. But I do know that there have been some additions made. For instance, those Olender-Elkus deposits of cash; I believe that there is some loans and some gifts that are included in this one that were not—I have not seen either one of them up to this minute.

Q. I will ask you whether or not it isn't a fact that [839] this particular schedule No. 4 deals with

(Testimony of Milton H. Olender.)

amounts of money which are stated to have gone in and come out of your safe deposit box?

A. That is correct.

Q. I will ask you whether or not a record was made at the time you put that money in the box and at the time you took that money out of the box, as to amounts going in or coming out?

A. No, sir, there was not.

Q. No record was made?

A. No record whatsoever.

Q. And is it not a fact then that this reconstruction which I show you here, which I understand was done by your accountant, must have been based on information which you gave to your accountant?

A. It was based on the information that was brought out here this morning, that there was only one possible source of funds and that this was the only possible source, if it was not from my business, not from my personal account, it would have had to come from the box, no other place.

Mr. Shelton: Your Honor, I move that answer be stricken that the witness be asked to answer the question.

Mr. Hagerty: I will join in the motion to strike, your Honor. It is also not responsive, but I will enter an objection to the question on the ground that it calls for [840] the opinion and conclusion of this defendant.

The Court: Overruled.

Mr. Hagerty: He doesn't know what was in the mind of the accountant in preparing his schedule.

(Testimony of Milton H. Olender.)

The Court: Overruled. Motion to strike granted.

Mr. Shelton: Will the Reporter read the last question, please?

(The record was read.)

A. Yes, I believe.

Mr. Hagerty: Also speculation, your Honor. It assumes facts not in evidence. It assumes he knows.

The Court: Well, if he knows he may answer.

Q. (By Mr. Shelton): Will you state, Mr. Olender, at what time Mr. Hellman was first engaged to perform work in this case?

A. I don't know exactly. Mr. Lewis brought him into me some time after he entered the case. I don't remember when.

Q. About how many weeks or months has it been since Mr. Hellman started to work on the case? A. I don't know.

Q. To the best of your knowledge?

Mr. Hagerty: Objected to as already asked and answered, your Honor.

The Court: He has answered. You don't know, is that the answer? [841]

A. That's correct, sir.

Mr. Shelton: I don't want to impinge upon the Court's ruling but I would like to ask this question to see whether it is proper.

Q. Can you tell me whether or not it was more or less than a year ago that Mr. Hellman started work on this case, Mr. Olender?

(Testimony of Milton H. Olender.)

A. It would definitely be after September of last year when I first hired Mr. Lewis.

Q. All right. Can you come any closer than that as to when Mr. Hellman started work?

A. No, I can't.

Q. I will ask you whether or not Mr. Hellman had any first hand information of the facts in this case? A. I don't know what he had.

Q. At the end of the year 1946, had Mr. Hellman any connection with your business or affairs at all? A. No, sir.

Q. So that all the information that he has acquired is subsequent to the time that the transactions occurred? A. I believe so.

Q. Now, Mr. Olender, I want to direct your attention to the five particular items which I believe represent changes from the original schedule, that is, there are five items, I believe, on Schedule 4 as revised which were not on the [842] original schedule 4.

Now the first of these, to which I wish to call your attention, is under the date of July 17, 1944. The caption or description is: "Transfer to Olender-Elkus bank account," in the amount of \$1,500.

State if you know why your accountant included that item under revised schedule and not on the original schedule?

A. I went to the bank on Saturday when I was free—the first time since I have been free in this trial—and dug up as many of the deposits as I could possibly find and I discovered many which he

(Testimony of Milton H. Olender.)

had not taken into account. This was one of them.

Q. State whether or not you advised your accountant as to the source of this \$1,500?

A. I did.

Q. What did you advise him?

A. I told him that it came out of my safe deposit box, as far as I knew.

Q. And that was the first time in this trial that you had so advised your accountant?

A. I believe so.

Q. I will direct your attention next, Mr. Olender, to the item under January of 1945, "Cash received from Fresno partnership," in the amount of \$1,807.46, and to the similar item on January of 1946 in the amount of \$1,725.11. [843]

I will ask you for what reason those two items were included in the revised schedule and not in the original schedule?

A. My accountant had not taken those into consideration. I had received that money and put it in the box and there was nothing in the record that showed that I had it.

Q. When did you first advise your accountant of the receipt of that money?

A. This last week.

Q. How was that money transmitted to you from the partnership?

A. In cash or cashier's check, I am not sure, by my mother.

Q. Where did you get it?

A. Either in Fresno or in Oakland.

(Testimony of Milton H. Olender.)

Q. Do you recall which? A. No, I don't.

Q. Will you state whether or not in the two months of January, 1945, and January of '46, each of the other partners in that business received a similar cash contribution? A. They did not.

Q. Why was your case considered special and why did you get special treatment?

Mr. Hagerty: I will object to this, your Honor, as [844] being outside the scope of the direct examination.

The Court: Overruled.

Mr. Hagerty: It is incompetent, irrelevant and immaterial what the others got.

The Court: Overruled.

A. The answer to that, Mr. Shelton, is that the tenants in the Olender building made separate checks to my two cousins, who are owners in that building, and up to the time of the death of my mother mailed one check to her, which included her share and my share. The other partners received their money every month, as we do now, check by check from each of our four tenants.

Q. (By Mr. Shelton): Now the distribution which you have stated with respect to January, 1945, was the distribution relating to the year 1944, was it not? A. I believe it was, yes.

Q. Will you state whether or not the distribution you have referred to for 1946 was the distribution for the year 1945? A. Yes, it was.

Q. Now would you state whether or not that distribution was on a basis of gross income?

(Testimony of Milton H. Olender.)

A. No, that was the final figure plus depreciation, which of course you have as income but is not included in your income as a total. I had a certain amount of money coming [845] to me which I got and then my income figure would be that figure less depreciation, but naturally this is how much I got.

Q. I will ask you, Mr. Olender, whether someone made a calculation of profit to the partnership in January, 1945, and January, 1946?

A. There was no profits. It was just a question of income and expenses, and the figure was—the final figure you got was the difference.

Q. Didn't I understand that these two figures were stated by you to have been net income figures?

A. Well, you understand, Mr. Shelton, I made out two returns. The partnership return was different from my individual return.

Mr. Shelton: Just a moment. If your Honor please, I ask that it be stricken and the defendant be instructed to answer the question.

The Court: All right, that may go out.

Mr. Shelton: Mr. Reporter, would you read the question back, please?

(The record was read.)

A. That's correct.

Q. (By Mr. Shelton): All right. If they were net income figures, isn't it a fact, Mr. Olender, that someone had to compute the net income? [846]

A. The accountant did that.

Q. Who was the accountant?

(Testimony of Milton H. Olender.)

A. This accountant, here.

Q. Those figures were computed, were they not, back about January of the years involved?

A. That's right.

Q. Who computed the net incomes of those two years at that time, Mr. Olender?

A. I did.

Q. You did? A. Yes, sir.

Q. Where did you do that?

A. Either in Oakland or Fresno.

Q. Do you remember which?

A. No, I don't. It could have been either place.

Q. Well now, what happened to the remainder, what happened to the gross income of those two—of the partnership in the two years which did not represent net income?

A. I don't understand your question.

Q. Well, in these two years this partnership had net income and gross income, did it not?

A. That's right.

Q. What happened to the funds which went to pay expenses? A. They were just paid.

Q. Was there a partnership bank account in those years? [847]

A. No, sir. Each partner paid their own taxes, their own share of expenses individually. The other two did. My mother paid all, mine and hers.

Q. And do I understand, for example, in the case of expenses, such as utilities, that the different partners would make direct checks payable to the Pacific Gas & Electric?

(Testimony of Milton H. Olender.)

A. There were no such checks. There were only two or three items per year and they were large items—insurance, some repair, and that's all. I think if you will check the partnership return you will never find over three or four items of expense the entire year, and those expenses were paid by each of the two partners in San Francisco individually and by my mother for me and her.

Q. And to whom were the checks drawn?

A. Which checks?

Q. The checks in payment of the expenses?

A. To the people that they were owed to.

Q. So that a man who had an obligation, had a debt coming from that partnership, would get some four checks separately? A. Three checks.

Q. Three checks? A. Yes, sir.

Q. Separately? A. Yes, sir, and still does.

Q. How many tenants were there on that partnership property, [848] Mr. Olender?

A. In which year, Mr. Shelton?

Q. First, the year 1944?

A. I believe—this is a rather difficult question to answer, because we had it subleased to a man who had two tenants. We received one check from him, while he received two checks from his tenants. But he mailed us his rent separately. So we actually had three tenants on the ground floor but received only two checks, one from Mr. Spurling, who was the man who rented out the other two stores.

Q. Do I understand that each of the years 1944,

(Testimony of Milton H. Olender.)

1945, Mr. Spurling drew one check to you and your mother for your share of the income and another check to the other two or three partners?

A. That is correct.

Q. Mr. Olender, are those checks available for those years? A. I believe they are, yes, sir.

Q. Could you produce them here in Court?

A. I can, if I can find them—I believe I can. I wouldn't have Mr. Spurling's check. He would have it back. I won't have it, but I will have our checks that we paid the bills separately for. [849]

Q. You will have your checks for expense?

A. We will have our checks which we paid, but I can't have the tenant's check. He will have his own check back.

Q. All right, sir. Now, Mr. Olender, I would like to direct your attention to the two additional changes from the original Schedule 4 to the revised Schedule 4. Each of them represents transfer to Olender-Elkus bank account. One is dated May 2, 1946, and the other is dated September 18th, 1946. I will ask you why those two items are on the revised schedule?

A. Because I just found them yesterday or the day before yesterday and gave them to my accountant.

Q. Did you advise your accountant that the two amounts involved, that is, \$1,700 and \$1,500, had come from your safe deposit box?

A. I believe I did.

Q. Are you sure about that?

(Testimony of Milton H. Olender.)

A. They couldn't have come from anywhere else.

Q. Will you answer the question, please?

A. I am fairly sure I told him that. You didn't state the correct figures there, Mr. Shelton, I don't think.

Q. Would you read them then, Mr. Olender, from the schedule?

A. I don't know which ones. There are three there and you read me two of the last ones. I think you read one [850] wrong.

Q. The two figures I am referring to are one, transfer to Olender-Elkus bank account \$1,700, May 2, 1946. Do you find that? A. Yes, sir.

Q. The other one was transfer to Olender-Elkus bank account in the amount of \$2,500 on September 18th? A. That is correct, yes, sir.

Q. Those are the two figures I just gave.

A. I didn't know that they were.

Q. So that your answer to the question would be the same? A. Yes, just the same.

Q. Mr. Olender, when you were on examination this morning by Mr. Hagerty I believe you testified as to your sources of income in the years 1944 through 1946, is that correct? A. Yes, sir.

Q. I will ask you whether or not you wish to include in that testimony as to sources the fact that during the year 1945 you received cash from sales of merchandise which you received from George Goodman?

(Testimony of Milton H. Olender.)

A. I believe so. Those, of course, went into my store account, I believe.

Q. Didn't you testify—

A. That was not income, Mr. Shelton.

Mr. Shelton: I ask to have the statement stricken, "it [851] was not income," if your Honor please.

The Court: Well, he may explain it.

The Witness: Your question asked me about income.

The Court: It may remain in the record. You may explain it as to what you meant by it.

The Witness: Well, Mr. Shelton asked me if that was the only source of my income, I believe, and that was not income.

Q. (By Mr. Shelton): I will ask you whether or not, Mr. Olender, this morning in listing sources of income you did not list gifts?

A. Yes, I listed gifts.

Q. Well, then in your classification, if you classified gifts as income and you were the one that was doing the testifying, do you not also classify as income money received from sales by Lewis Leavy of sailor suits sold to Mr. Lerman?

A. My understanding of income is something that you are ahead on, something that is profit. This is not profit. These were sold at cost. There was no income.

Mr. Shelton: Your Honor, may that go out as unresponsive?

The Court: Motion denied.

(Testimony of Milton H. Olender.)

Mr. Hagerty: At this time, if your Honor please, I offer to Mr. Shelton the state income tax return that he requested. We found the 1946 in the office, and we have the partnership state return for 1946 in evidence which is defendant's No. Q in evidence. We don't have the 1944 and [852] '45 in the office, but we will make a search for them tonight if you want them.

Q. (By Mr. Shelton): Mr. Olender, do you recall what happened to your State of California 19—

A. I don't, but I have copies. If they haven't them, I have them. I will get them for you, be very happy to.

Q. And you believe you can produce those in the morning? A. Yes, sir.

Q. Mr. Olender, this morning on voir dire you were asked about whether the 1944 and 1945 personal checks that you produced constituted all your personal checks for those years. Have you had an opportunity to refresh your recollection since that time as to whether you did include in the checks produced all that you wrote in those years?

A. I believe I did. May I ask you a question? I don't know what voir dire means. I have heard it thrown around here a lot, but I don't know what it means at all.

Q. That was when I was asking you questions before the admission of those checks into evidence. You remember Mr. Hagerty—

(Testimony of Milton H. Olender.)

A. I remember that, I just don't know the meaning of the word *voir dire*.

Q. It was the time I was questioning you about those checks, you recall it?

A. Yes, I recall it. [853]

Q. Since that time have you had the opportunity to refresh your recollection as to whether you produced all the 1944 and all the 1945 checks on your personal bank account?

A. I haven't had any opportunity, but I am sure that is all that there are. I don't know where any others are.

Q. Mr. Olender, the Government accountants tell me that for the year 1944 there were 14 checks that were not produced, and for the year 1945 there were three personal checks which were not produced. Do you know where those checks are?

A. If I knew they would be here, sir.

Q. Do you know where they are?

A. No, sir, I do not.

Q. Mr. Olender, I believe you will recall that this morning on direct examination you testified with respect to your 1947 income tax return that you included therein an item of interest on \$20,000 of bonds.

A. Yes, sir.

Q. Now, those bonds have been referred to considerably in this trial. I will ask you in what year those bonds were purchased?

A. I believe 1945. I am not sure.

Q. All right, sir. Was there income in the year 1945 on those bonds?

A. No, sir.

(Testimony of Milton H. Olender.)

Q. Now, in the years 1946 to 1948, I will ask you whether [854] you prepared your own individual income tax returns?

A. I don't think I did in '48.

Q. All right, sir, I will ask you whether in the year 1946 you did not prepare your own income tax return? A. Yes, I did.

Q. I will ask you whether in the year 1947 you did not give information to Mr. Ringo to be used in preparing your individual return?

A. I did.

Q. I will ask you whether in the year 1948 you gave information to Mr. Ringo for use in preparing your 1948 individual return? A. I did.

Q. I will ask you for the years 1946 to 1948 who prepared the income tax returns of your mother, Mrs. Mollie Olender? A. I did.

Q. For the year 1946 who reported the income on the \$20,000 of bonds I have referred to?

A. My mother did.

Q. And the year 1947 who reported the income on those \$20,000 of bonds? A. I did.

Q. And did you do that pursuant to work papers given to Mr. Ringo? Did you make for him a work paper showing your income in that year from which he prepared your return? [855]

A. I probably did.

Q. That is in evidence in this case, isn't it, Mr. Olender? It was identified here?

A. I don't know. I guess it is.

(Testimony of Milton H. Olender.)

Mr. Shelton: May I have plaintiff's Exhibit No. 27 in evidence?

Q. (By Mr. Shelton): I show you, Mr. Olender, Government's Exhibit 27 in evidence and ask you what it is?

A. It is an itemized statement of my income and expenses for 194—something, I don't know.

Q. Well, to shorten it, did you give that to Mr. Ringo to prepare your 1947 return?

A. I believe I did.

Q. I show you Government's Exhibit 28 in evidence and ask you if you gave that to Mr. Ringo for the purpose of preparing your 1948 return?

Mr. Hagerty: If your Honor please, for the purpose of the record may I have that running objection to all documents that came from the witness Ringo?

The Court: Yes. The objection is overruled.

A. Yes, I did.

Q. (By Mr. Shelton): Then, Mr. Olender, who reported the 1947 income on those bonds?

A. My mother, I believe.

Q. Wasn't it your testimony this morning that you reported [856] that income in 1947?

A. No, sir.

Q. It was not your testimony?

Mr. Hagerty: If your Honor please, as far as—I am going to make an objection here. The defendant is being cross-examined upon complicated reports, reports which speak for themselves and are the best evidence of what they state. I think

(Testimony of Milton H. Olender.)

this is a tricky method of trying to confuse the witness. I am not sure that it is 1947 or '46——

The Witness: My last statement was wrong.

Mr. Hagerty: One year his mother reported, the next year he did.

The Court: You may resort to the documents.

The Witness: I was wrong, I was thinking he meant 1948. I did report it in 1947, not '48.

Mr. Hagerty: At this time, when the question originally arose, the Government agreed to produce the mother's income tax returns showing that for 1946 and at this time I would ask for this return.

Mr. Shelton: My recollection is that the clerk's records will show that they were lodged with him on that day. I would like to ask him. The record will show, Mr. Hagerty, that we produced that return that same day.

Mr. Hagerty: Yes, I overlooked putting it in evidence, but may I at this time offer it as defendant's—— [857]

The Court: After counsel finishes.

Q. (By Mr. Shelton): Mr. Olender, did you then testify this morning on direct examination by Mr. Hagerty that that 1947 income was reported on your own return?

A. That is correct, Mr. Shelton, yes.

Q. And for the calendar year 1948 who reported the income on those \$20,000 bonds?

A. My mother.

Mr. Shelton: If your Honor please, the Government will at this time offer in evidence Exhibits 11

(Testimony of Milton H. Olender.)

and 12 for identification which are respectively the 1947 and 1948 returns of Milton Olender as an individual.

The Court: They may be marked in evidence.

Mr. Hagerty: We have no objection, your Honor. It is outside the scope of the indictment.

The Clerk: United States Exhibits 11 and 12 heretofore for identification, now in evidence.

(Thereupon U. S. Exhibits Nos. 11 and 12 for identification were received in evidence.)

Mr. Shelton: It is offered on the basis of wilfulness, if the Court please.

Q. (By Mr. Shelton): Mr. Olender, I show you defendant's Exhibit AB and I want you to look particularly at the very top sheet there which appears to represent a deposit. Will you state to the Court the circumstances of that deposit [858] including whether or not you yourself made it?

A. Yes, sir, I made the deposit myself.

Q. Will you state to the Court and Jury where the \$5,000 involved in that deposit originated?

A. It came from my safe deposit box as far as I remember.

Q. Do you recall whether anyone went with you to the safe deposit box?

A. No one ever went with me to the safe deposit box except Mr. Friedman.

Q. Mr. Olender, would you mind letting me finish my question before you answer?

A. I am sorry, sir.

(Testimony of Milton H. Olender.)

Q. Will you state who, if anyone, went with you to your safe deposit box at the time you drew out the \$5,000? A. No one, to my knowledge.

Q. If you recall, will you state who, if anyone, went with you to the bank at the time that you deposited the \$5,000?

A. No one that I remember.

Q. Will you describe what happened when you got to the bank, as well as you remember it?

A. Yes, sir. When you open a new account in the bank you have to go up to the new accounts window and they usually have a rather inexperienced person there. So I went to Mr. Seale, whose name you will find on the bottom there, who is one of the oldest and most able tellers in the bank and I [859] handed him the \$5,000. He then made out what is known as a T-X, a teller's exchange. That meant that the teller at the new accounts window would not have to count that money. They usually take about 15 minutes to count that and Mr. Seale can count it in three minutes. And then he took it up to the new account window, they made the entry and put it in my bank book.

Q. What denominations were the money——

A. I don't remember.

Q. Would you again let me finish my questions before you interrupt, Mr. Olender?

A. I am sorry, I thought you were finished.

Mr. Shelton: If your Honor please, would this be an appropriate time for the afternoon recess?

The Court: All right, we will take the afternoon recess, ladies and gentlemen. The same admonition to you.

(Short recess.)

Mr. Hagerty: If your Honor please, with your consent we would withdraw the defendant at this time and put on two short witnesses.

The Court: All right.

VERA MANGER

called as a witness on behalf of the defendant, sworn.

The Clerk: Please state your name, your address and [860] your occupation, if any, to the Court and Jury.

The Witness: Vera Manger, 526 Cornell Street, San Lorenzo.

The Clerk: And your occupation?

The Witness: I am a housewife; mother.

Direct Examination

By Mr. Hagerty:

Q. Mrs. Manger, are you acquainted with the defendant in this case, Mr. Olender? A. Yes.

Q. And how long have you known him?

A. Oh, about ten years.

Q. Directing your attention to the year 1943, approximately, were you employed at that time?

A. Yes, I was employed by Dorfman Hat Company in Oakland.

Q. What was your occupation?

(Testimony of Vera Manger.)

A. Bookkeeper.

Q. At that time did you enter into the employ of the defendant, Mr. Olender? A. Yes.

Q. Was that on a full-time or part-time basis?

A. He was a very good customer of the Dorfman Hat Company and they allowed me to set up his books and go there for a couple of hours a week.

Q. So you went over there and set up a set of books for him; is that true? [861]

A. I did.

Q. Did he have a set of books when you went there?

A. Well, it was very vague and I had to set them up myself.

Q. I see, the books were inadequate that you found there, is that true? A. Yes.

Q. Now I call your attention to defendant's Exhibits K, J, I and H, in evidence, and ask you if you recognize them?

A. Yes, those are the books I set up.

Q. And before today how long has it been since you have seen these exhibits? A. Six years.

Q. Examining these records, are the entries in your handwriting? A. Yes.

Q. When you were employed by Mr. Olender did he ever make any entries in those books?

A. No, sir.

Q. You made all the entries, is that right?

A. That is right, I did it all myself.

Q. Will you explain to His Honor, the Judge, and the ladies and gentlemen of the jury your

(Testimony of Vera Manger.)

routine each week, how would you handle your duties there?

A. Well, when I came in he would give me all the invoices and I would enter all the bills and all the papers were waiting [862] for me. I took care of everything.

Q. Did he ever at any time try to tell you where to put things in the books?

A. No, sir, I don't think he would know how.

Q. I will direct your attention now to a transaction or an entry in Exhibit K at page 51. On page 51 under the date June, 1945, there is an entry, June 19th, 1945. Is that in your handwriting? A. Yes.

Q. Would you please read the entry to the ladies and gentlemen of the Jury?

A. That is on the 19th of June. It was a check made out to Seagoing Uniform Corporation for \$27,000.

Q. Then drawing your attention to page 52 in the same exhibit under date of July 14th, 1945, is there an entry in your handwriting?

A. Yes, Joseph Svabo—I can't quite pronounce it, but I guess that is what it is, for \$50,000.

Q. Do both those entries indicate checks drawn by the defendant payable to those named firms?

A. Those are checks I probably made out.

Q. Those entries are in your handwriting, is that true? A. That is right.

Q. Now directing your attention to Exhibit J, defendant's Exhibit J in evidence which was in-

(Testimony of Vera Manger.)

dicated as being the [863] general journal of the Army & Navy Store at page 19 there is an entry under the date of July 25, and also one under the same date on the same page, both entries under July 25. Are they in your handwriting?

A. Yes, sir.

Q. Would you please read those entries to the ladies and gentlemen of the Jury and tell us what they represent?

A. Well, this was on July 25th and I debited cash for \$27,000 and accounts payable I credited for \$27,000 because the check was returned, and there is also—which other date was that?

Q. The same date, July 25th, but it is down several lines.

A. Oh, yes, and there is another one for \$50,000, check No. 2482. That was \$50,000 accounts payable that the check was returned.

Q. In other words, it is your testimony that these two checks, one for \$27,000 drawn in favor of the Seagoing Uniform Company and the second for \$50,000 in favor of Joseph Svabo were both returned? A. Yes.

Q. Do you know why they were returned?

A. Well, at that time it was war time. I recall that merchandise was very hard to get and I know that we sent out the checks before the merchandise, and then they couldn't fill it, they would send the checks back. [864]

Q. I will direct your attention again to defendant's Exhibit J which is the general journal at

(Testimony of Vera Manger.)

page 17. There is an entry under date of February 28th, 1945, reading, "Accounts payable, M. Olender." There is a debit to accounts payable and a credit to M. Olender investment account with an explanation to record cash payments covering purchases from Money Back Smith and Barney's Clothes Shop in the amount of \$6,932. Is that entry in your handwriting? A. That is right.

Q. Can you explain that to the ladies and gentlemen of the Jury?

A. Well, that is probably an entry that when I went to pay the check, that we found that he had paid that out of his personal account so then I debited the accounts payable and then credited his investment account. He paid that out of his personal account.

Mr. Shelton: Objected to, if your Honor please, on the basis she said that was probably the entry. It doesn't seem very definite.

The Witness: That was the entry. It is a figure of speech.

Q. (By Mr. Hagerty): While you were keeping the books for the defendant on a part-time basis you were still employed full time by Dorfman Hat Company, is that true?

A. Yes, sir. [865]

Q. Are you presently employed, Mrs. Manger?

A. No, I am a mother of two children and I have a sitter home and—

Q. I think that is a full-time job in itself?

A. You can say that again.

(Testimony of Vera Manger.)

Q. In all the time that you were employed by the defendant is it your testimony that he did not attempt to dictate the bookkeeping policy to you?

A. No, sir, that was entirely my job.

Mr. Hagerty: You may cross-examine.

Cross-Examination

By Mr. Drewes:

Q. Mrs. Manger, for how long were you employed by Mr. Olender on a part-time basis?

A. Around three years. I think it was three years.

Q. Beginning in 1943? A. Yes.

Q. From what information did you make your entries in the book, Mrs. Manger?

A. From all the papers, all the invoices and the checks and the papers.

Q. Where did you find those?

A. Those were waiting on a desk when I came in.

Q. On the desk that you use?

A. That is right.

Q. And from what source did you get information as to sales, [866] if you recall?

A. Well, he had to give those to me from his deposit book.

Q. Who put the invoices, checks, and other materials to which you referred on the desk for you?

A. Well, sometimes they were there unopened from the mail. They were just waiting there and I would check them.

(Testimony of Vera Manger.)

Q. And at other times——

A. Other times they were opened. I guess when they wanted to check merchandise as it came in.

Q. Were the entries which you made in the book made solely from information furnished you by Mr. Olender?

A. They were made from the invoices and the transactions that I took care of.

Q. Did Mr. Olender give you those invoices and furnish the information to you?

A. Well, he just left the information—I mean the invoice there, and I just handled it in my own way.

Q. If any question arose as to how a transaction was going to be reflected in the books, Mrs. Manger, whom did you consult?

A. Well, there wasn't any question except when I went to make a payment on something like that one in question and he told me it was already paid. He had forgotten to tell me, and that is why I made that entry. [867]

Q. Did you find it necessary to consult Mr. Olender from time to time in order to determine more properly how to account for entries?

A. No, I just took care of the books and just gave him the balance at the end of the year.

Q. I am going to give you again, Mrs. Manger, defendant's Exhibits H, I, J, and K, and ask you to turn to the capital account?

A. You mean his personal account?

Q. I believe you will find in the investment account in 1945 a credit in the amount of \$5,000 is

(Testimony of Vera Manger.)

reflected. Will you see if you can find that for me? It should be June of 1945, if I am correct.

A. In what?

Q. June of 1945. A. Yes.

Q. Is there reflected there an entry crediting the investment account in the amount of \$5,000?

A. On June? No.

Q. I beg your pardon. Do you find a credit in the amount of \$23,000 to the investment account?

A. In June of 1945?

Q. Yes. A. No.

Q. Do you find a credit in the amount of \$13,000? [868] A. No.

Q. Will you turn to the general journal then, Mrs. Manger? A. Yes.

Q. Do you find there under date of June 19th, 1945, a debit to cash in the amount of \$23,000?

A. In June of 1945? What is the amount?

Q. Debit to cash in the amount of \$23,000?

A. Yes, I do.

Q. And what are the offsetting credits?

A. Loans payable to J. Blankstein and to the capital account a reinvestment.

Q. Did you make that entry? A. Yes.

Q. Upon what information was that entry based?

A. Well, it has been so long I can't recall.

Q. Well, let me ask you this—

A. It is my handwriting, though.

Q. Would you make an entry of that kind credit-

(Testimony of Vera Manger.)

ing the capital account of Mr. Olender without consulting him? A. I don't think so.

Q. As a part-time bookkeeper you would not know of an additional investment of capital in the business unless your employer so advised you, would you? A. Yes.

Q. That is correct, is it not? [869]

A. Yes.

Q. Mrs. Manger, for the purposes of refreshing your recollection I am going to show you photostatic copies of nine cashier's checks in varying amounts, each payable to George Goodman and all dated early in 1944, and three applications for cashier's checks concerning which there has been considerable testimony in this trial. I am going to ask you if, in the course of your employment for Mr. Olender, you recall any conversation with him or recall any other information coming to your attention from any source with respect to those checks or those applications?

A. No, I don't.

Q. I believe you testified on direct examination, Mrs. Manger, concerning certain journal entries made for the purpose of adjusting the accounts payable account with particular respect to transactions had with Barney's and with Money Back Smith. Can you find that? Do you have the journal in front of you?

A. Yes. When was that now?

Q. I believe that was in February of 1945.

Mr. Hagerty: It is page 17.

(Testimony of Vera Manger.)

A. Yes, I have it.

Q. (By Mr. Drewes): Do you have that?

A. Yes, I have.

Q. In front of you? [870] A. Yes.

Q. And do you have also the purchase account? Can you tell me when that entry was made with respect—strike that. When was the adjusting entry made in connection with those two matters?

A. Well, the date of this is February 28th.

Q. And will you read the entry again?

A. Well, I have debited accounts payable for \$6,903.02, and credited the investment account to record the cash payments covering purchases for Money Back Smith and Barney's Clothes Shop.

Q. Do you recall the circumstances under which that entry was made?

A. Well, I can see it is self-explanatory.

Q. Never mind. Beyond that, do you recall any conversation with Mr. Olender concerning that entry?

A. Well, just by looking at it I know I must have started to make out checks and he told me he had forgot to tell me he had paid cash. That is why I would make this type of entry.

Q. That is why I am asking you the question, do you have any recollection here and today and as you now testify concerning that issue?

Mr. Hagerty: I will object to that, your Honor. It is already asked and answered. He says it is automatic from [871] the entry itself.

The Court: Objection overruled.

Q. (By Mr. Drewes): Do you have any inde-

(Testimony of Vera Manger.)

pendent recollection now as to the circumstances leading up to that particular entry in the journal?

A. Well, I can't recall any conversation, not after six years, but just from looking at it I know just——

Q. Well, the record speaks for itself, Mrs. Manger. I wondered whether you had any additional recollection of any of the circumstances under which that was made?

Mr. Hagerty: If your Honor please, I think she should be permitted to explain her answer. She has been cut off several times.

The Court: The witness may explain.

The Witness: It was my procedure, I would make out the checks and then he would look them over before I would send them out, and apparently from this entry he told me that he forgot to tell me that he made cash payments for these particular bills out of his personal account. Therefore, I made this entry.

Q. (By Mr. Drewes): Is it your recollection that he told you that he had made cash payments out of his personal account?

A. Well, that is why this entry was made. I was only there a few hours a week. Sometimes he made payments without [872] me.

Q. It is your best recollection that Mr. Olender stated to you that those particular accounts payable had already been paid? A. Yes, sir.

Q. And that they had been paid out of his—— paid by him out of his personal account?

(Testimony of Vera Manger.)

A. Yes.

Q. Did you enter into the books, Mrs. Manger, all of the purchases and sales that Mr. Olender called to your attention? A. Yes.

Q. State, if you know, who opened the mail at Mr. Olender's place of business?

A. Well, I wouldn't know.

Q. Did you open any of the mail?

A. Well, sometimes there were some unopened ones that were obviously invoices.

Q. You say sometimes. I take it, then, that most of the time the mail was opened by someone else? A. Well, yes.

Q. And you don't know who that person is or was? A. No.

Q. In connection, Mrs. Manger, with the journal entry in the amount of \$23,000, debit cash \$23,000, credit loans payable \$10,000 and capital investment \$13,000, which we have— [873] to which we have already alluded, had you known that of the \$13,000 credited to the capital account, \$5,000 represented the proceeds of sale, would you have made the entry as it is reflected in the journal?

A. I don't quite understand that question. Would you repeat it?

Q. I will rephrase it, Mrs. Manger. You have the entry in mind, the June 19th entry, showing a debit to cash and a corresponding credit to capital account and loans payable. Do you have that in mind? A. Yes.

Q. Now, with respect particularly to the credit

(Testimony of Vera Manger.)

of \$13,000 to the capital investment account, had you known that \$5,000 of that \$13,000 represented proceeds from the sales of goods, would you have made the credit to the capital account as it is shown in the journal?

Mr. Hagerty: Just a minute, if your Honor please. That is a hypothetical question. It is based upon facts not in evidence.

Mr. Drewes: She is a bookkeeper, your Honor.

The Court: Overruled.

Mr. Drewes: You may answer the question.

A. Well, the sales were handled right from the tapes and they were deposited, and that is where I got my sales figures. This had nothing to do with the sales. [874]

Q. That wasn't my question, Mrs. Manger. I posed a question to you which, as counsel has stated, is a hypothetical question. As a bookkeeper, had you known that the \$13,000 which is shown as a credit to the capital account, of that sum, \$5,000 was a receipt from the sale of goods——

A. How would I know that?

Q. Did you ask anyone about that particular item?

A. Well, I can't recall now, but all the sales were entered in the sales book with the cash and this is a journal entry. If it was a sale it would have been entered as a sale.

Q. Then your answer, I take it, is that if \$5,000 of that sum of \$13,000 shown as a credit to the investment account had been received from sales

(Testimony of Vera Manger.)

you would not have made the entry as shown in the book?

A. I don't know anything about that entry being sales. As far as I know that is just what it is, a reinvestment.

Q. Mrs. Manger, I am simply trying to elicit a reply to a hypothetical question I have posed to you three times now. Now, just forget about the entry as it purports to be and answer my question. If, assuming that the \$13,000 included \$5,000 which had been received by the store from the sale of goods would you have made that entry as it appears in the books?

A. Well, as a bookkeeper, if you assume a part of it had been sales, well then I will assume that it was and that it [875] would have been entered a different way; but assuming that it wasn't sales—I mean saying that it wasn't sales, I entered it the way it was supposed to be entered.

Q. Will you turn again to the entries in the purchase book, Mrs. Manger, and find particularly the original credits to the Barney and Money Back Smith accounts?

A. Do you have the dates for that so I will know the page number?

Mr. Hagerty: I think that was page 17.

Q. (By Mr. Drewes): The end of 1944.

A. Oh, it was a general journal entry?

Q. Will you turn to the ledger please, where the original entries are reflected, original charges

(Testimony of Vera Manger.)

to purchase. You have the purchase register, wouldn't it be shown in there?

A. What page is it? It was during 1945?

Mr. Drewes: 1944, I believe. The end of 1944.

A. I see here several invoices. This must be it. From here down to here (indicating) inclusive that is.

Q. (By Mr. Drewes): Do the Barney transactions, the Barney purchases appear there?

A. Yes.

Q. And also a number of purchases from Money Back Smith? A. Yes, sir.

Q. And are the respective dates of those purchases shown? A. Yes. [876]

Q. Would you read the dates of the respective purchases?

A. Money Back Smith, February 8—do you want the amounts?

Q. No, just the dates, please.

A. February 8, February 3, February 2, the 24th, the 24th, March 15th, March 8th, March 2nd. And then for Barneys there is on October 30th and November 30th.

Q. Now the entries to which you have just referred appear in the register at the end thereof. In other words, they appear after the entries for the final months of the year 1944, do they not?

A. No, they appear in the last month.

Q. They appear in the last month?

A. Yes, sir.

Q. Although, as you have just indicated the

(Testimony of Vera Manger.)

purchases were made much earlier in the year, were they not? A. Yes.

Q. Can you explain why the entries that were made in the purchase register in the last month of the year—can you explain why the entries were made in the purchase register in the last month of the year although the purchases were actually made very much earlier?

A. Well, I can't quite recall, but it might have been because he wanted to return the merchandise which sometimes happened. Or maybe he decided to keep it. [877]

Q. Do you recall any of the circumstances which led up to the making of those entries in the books as you have just read them? A. No, I don't.

Q. So when you say that Mr. Olender might have wished to return those goods you are guessing or surmising, are you not?

A. Well, it happened with other stuff, with other merchandise, that sometimes they wouldn't enter a bill because they were going to send the merchandise back.

Q. Did Mr. Olender ever tell you that he intended to send that merchandise back?

A. Well, I can't recall now.

Q. You have stated, Mrs. Manger, that you understood that Mr. Olender had paid for those purchases out of his personal account. What do you mean by "his personal account"?

A. Well, he had his own personal account outside of the business account.

(Testimony of Vera Manger.)

Q. Do you know where he kept that account?

A. I don't know anything about it.

Q. Do you know what kind of an account it was?

A. No, I just know it was his personal account.

Q. You think it was a bank account, commercial account in a bank? [878]

A. Yes, bank account, I imagine.

Q. Mr. Olender told you that he had paid for those purchases out of his personal account?

A. That is right.

Q. Do you recall, Mrs. Manger, when the defendant told you that he had paid for that merchandise out of his personal account?

A. Well, whatever the date of the—I don't know—the entry, I guess or when I entered it, or when I went to pay for it. That is probably when it happened. I mean that is when it happened.

Q. Do you have any recollection of his telling you when he paid for it?

A. Well, I can't quite recall, but I used to make out the payments and he probably caught it then and told me he had already paid for it out of his personal account.

Q. Those entries are not made until December of 1944, the original charges to the purchase account are made in the last month of 1944?

A. Uh-huh.

Q. The purchases themselves were made much earlier in the year, were they not? A. Yes.

(Testimony of Vera Manger.)

Q. Now, do you recall any conversation with Mr. Olender concerning the posting of those entries? [879]

A. No, he never told me how to post.

Mr. Hagerty: Objected to, your Honor—well, the answer is in already.

The Witness: I don't think he even knew how I kept the books.

Mr. Drewes: May that be stricken, your Honor?

Mr. Hagerty: I think it is part of the answer.

Mr. Drewes: It is not responsive, and an opinion and conclusion of the witness. I asked her no question at all.

The Court: It may go out.

Mr. Drewes: That is all.

Redirect Examination

By Mr. Hagerty:

Q. Mrs. Manger, the defendant—let me withdraw that. Do you have any exact idea that the defendant told you he paid for these things out of a personal account or out of personal funds or out of his personal cash?

A. Well, I can't recall that.

Q. You don't know, do you? A. No.

Mr. Hagerty: No further questions. You may step down.

The Court: All right, the witness is excused.

(Witness excused.)

The Court: Is the next witness a lengthy witness?

Mr. Hagerty: No, this will be a very short witness. This concludes the two bookkeepers that had to do with the books. [880]

The Court: It is about time for the adjournment. I am not going to keep the jury late.

Mr. Hagerty: No, these two ladies came from across the Bay. This witness will be very short. At this time, if your Honor please, I would like to offer in evidence as the Defendant's next Exhibit in order the return of Mrs. Mollie Olender for the year 1946.

The Court: It may be marked in evidence.

Mr. Drewes: No objection.

The Clerk: Defendant's Exhibit AH in evidence.

(Thereupon the document above referred to was received in evidence and marked Defendant's Exhibit AH.)

VIRGINIA BUSBY

called for the defendant, sworn.

The Clerk: Will you state your name, your address and your occupation if any, to the court and to the jury?

The Witness: Virginia Busby, 1430 Alma Avenue, Walnut Creek, and I am a bookkeeper at West Coast Printing Company.

(Testimony of Virginia Busby.)

Direct Examination

By Mr. Hagerty:

Q. Mrs. Busby, you are employed as a full-time bookkeeper at the West Coast Printing Company in Oakland, is that true? A. Yes, sir.

Q. And what system of bookkeeping is in effect there? [881]

A. Gee, just a regular system of bookkeeping—accounts receivable, accounts payable, check register and cash.

Q. Is it sometimes termed a Hadley system?

A. No, we don't use the Hadley sheets. The Hadley system is really a—it is, I believe a printing company that just puts out regular sheets and regular ledgers.

Q. Are you also employed by the defendant, Milton Olender, as a part-time bookkeeper?

A. Yes, sir.

Q. And have you been so employed since 1946?

A. Yes, sir.

Q. You have before you various Exhibits of the defendant which constitute books of account from his firm, Exhibits, I,J,H,K. Do you recognize them? A. Yes, sir.

Mr. Drewes: If your Honor please, may I interrupt just a moment. The witness testified that she had been employed by the defendant since 1946. I would like to have the date established with more particularity.

Mr. Hagerty: Yes.

(Testimony of Virginia Busby.)

Q. (By Mr. Hagerty): I will bring to your attention, Mrs. Busby, Defendant's Exhibit L in evidence which purports to be a check record. Do you recognize this Exhibit? A. Yes, sir.

Q. Opening to page 1 of the Exhibit there are several entries [882] beginning with June 1, 1946. Are they in your handwriting? A. Yes, sir.

Q. Is that approximately the time you started to keep the defendant's books?

A. Well, I believe it was the early part of May.

Q. The early part of May, 1946?

A. Yes, sir.

Q. Are you acquainted with Mrs. Vera Manger?

A. Yes, sir.

Q. And did you know that she had been so employed prior to your employment?

A. Yes, sir, because when I went up there, why, she showed me how they worked their books so I could follow right on in the same system.

Q. Now, in reference to your duties while employed by Mr. Olender, did he make any entries in the books? A. No, sir.

Q. Did he tell you how to make entries in the books? A. No, sir.

Q. Will you describe to his Honor and the ladies and gentlemen of the jury your routine duties at Mr. Olender's?

A. I take all the invoices and I enter them into the purchase ledger. I take all the sales receipts and enter them into the cash received, and I take the check register and enter it into the cash dis-

(Testimony of Virginia Busby.)

bursed. Then I extend it out [883] to the various——

Q. Have any agents for the Bureau of Internal Revenue ever questioned you in connection with the affairs of Mr. Olender?

Mr. Drewes: Object to that your Honor, as irrelevant and immaterial.

The Court: Overruled.

Mr. Hagerty: You may answer.

A. Yes, down at West Coast Printing Company two gentlemen came in, told me they were from the Government, and they wanted to look up a check, and I don't remember whether they had the check number or the amount, but they had the day and the month and the year.

Q. What was the check?

A. It was a pay check issued to me.

Q. Paycheck issued to you?

A. By West Coast Printing Company.

Q. How had you cashed that check?

Mr. Drewes: Your Honor, what does that have to do with any of the issues that are before this jury?

Mr. Hagerty: It is preliminary, your Honor. In other words, I wish to show the extent and detail which the Government went in this investigation which will be material later on.

Mr. Drewes: It is irrelevant. [884]

The Court: Unless you connect it up in some fashion I will strike it.

(Testimony of Virginia Busby.)

Q. (By Mr. Hagerty): What was the amount of the check?

A. I believe it was around \$56, \$57, it was my pay check.

Q. Did it have an endorsement on it of Mr. Olender's? A. Yes, sir.

Q. Why?

A. Because he cashed my pay check for me up to his house.

Q. Was that the only inquiry made of you by the men from the Bureau of Internal Revenue?

A. Yes, sir.

The Court: I think the last may be stricken. I can't see any relevancy.

Mr. Hagerty: Well, if your Honor please—all right, we withdraw it.

The Court: This witness has been excused and Court will adjourn this case until tomorrow morning at 10 o'clock with the same admonition not to discuss the case or form an opinion until the matter is submitted to you.

(Thereupon Court was recessed until Wednesday, October 1, 1952, at 10 o'clock a.m.) [885]

October 1st, 1952, 10:00 A.M.

MILTON H. OLENDER

resumed the stand, and having been previously duly sworn, testified further as follows:

The Clerk: Mr. Olender, will you please restate your name for the record?

A. Milton Howard Olender.

Recross-Examination

(Resumed)

By Mr. Shelton:

Q. Just prior to the beginning of Court one of your attorneys handed me your 1944 and 1945 California State income tax returns. I show you here your 1944 California return and ask you what the inventory figure is for December 31st, 1944, as shown on that return?

A. Would that be the end inventory or the beginning inventory, Mr. Shelton?

Q. For the year 1944 it would be the end.

A. \$85,011.26.

Q. I will also show you your 1945 California income tax return and ask you what the opening inventory on that is as of January 1st, 1945?

A. The exact same figure.

Q. And there is no other place on those two returns, is there, where any inventory appears?

A. Just the ending inventories of each [886] year.

Q. Any other inventory as of December 31, 1944?

A. No, sir.

(Testimony of Milton H. Olender.)

Q. I will ask you whether or not these inventory figures of \$85,000 plus includes any of that George Goodman merchandise that you testified about earlier on this stand? A. They do not.

Q. I will ask you whether or not these two returns were not also prepared under the penalties of perjury? A. They were.

Mr. Shelton: The Government will offer these two returns, if your Honor please, the 1944 as the Government's next in order, and the 1945 following that.

The Court: They may be marked.

The Clerk: U. S. Exhibits No. 49 and 50 in evidence.

(Thereupon the California State income tax returns of the defendant for the years 1944 and 1945 were marked U. S. Exhibits Nos. 49 and 50 respectively in evidence.)

Q. (By Mr. Shelton): Mr. Olender, I will show you defendant's Exhibit T in evidence, which is a bank book in the name of Betty Olender.

She is your wife, is she not?

A. Yes, sir.

Q. I will invite your attention to an entry in that book indicating a \$5,000 deposit, I believe as of December 12, 19—— [887]

A. December 20th.

Q. December 20th—I beg your pardon—1945. Have you examined that entry?

A. You mean here or——

(Testimony of Milton H. Olender.)

Q. In this pass book? A. Yes.

Q. And that was a deposit made in your wife's bank account, was it not? A. Yes, sir.

Q. And who made that deposit?

A. I don't remember.

Q. What was the source of the \$5,000 covered by that deposit, Mr. Olender?

A. \$3,000 of that was Mrs. Foote's and \$2,000 of it was from me, to the best of my recollection.

Q. \$2,000 then of that was yours?

A. It came from some source outside of my business. But it was mine. It wasn't Mrs. Foote's.

Q. It was money which originated with you?

A. Yes, sir.

Q. And from where did you get that \$2,000 to deposit in this account?

A. I believe I drew a check on the Army & Navy Store. I am not sure.

Q. Will you state whether or not that \$2,000 came from your [888] safe deposit box?

A. It could have. I don't remember.

Q. Well, is it your testimony that you do or do not know where it came from?

A. I do not know at this time where it came from.

Q. Mr. Olender, I show you a ledger account showing deposits and withdrawals from the Bank of America in the account of Milton H. Olender, and I will invite your attention to a sheet here as of December, 1945. There are some five items here, all but one having a red check mark.

(Testimony of Milton H. Olender.)

A. Yes, sir.

Q. Who placed those red check marks on that sheet, if you know?

A. I don't know. I know I didn't.

Q. I invite your attention to the one item there that does not have a red check mark beside it and ask you what that is?

A. I don't know. I presume that is the check I issued to my wife at that time. I don't know.

I believe Mr. Lewis' accountant has that check.

Mr. Shelton: May I ask defense counsel through the Court if they have that check?

Mr. Lewis: What is the date of the check?

Mr. Shelton: December 20, 1945, is the date of the indicated withdrawal, Mr. Lewis—Milton H. Olender's [889] personal account in the Bank of America.

Mr. Hellman: Is there such a check indicated on the bank statement, indicated as going through that account?

Mr. Shelton: I will let you look at the bank statement, Mr. Hellman (showing).

Q. (By Mr. Shelton): Mr. Olender, have you seen this \$5,000 check represented by this item?

A. I have seen it at some time. I don't remember when. But I believe recently.

Q. Do you believe that you can locate that check? A. I will try.

Q. I will ask you whether or not there is any tie-in between that \$5,000 entry here in this ledger

(Testimony of Milton H. Olender.)

account, Mr. Olender, and in the \$5,000 deposit on the same day in your wife's bank account?

A. No, there isn't.

Q. It is purely coincidental then that the \$5,000 item in your wife's bank account and the \$5,000 withdrawal from your own bank account is in the same amount?

A. No, it is not coincidental. I am sure that \$5,000 out of my personal account went into my wife's bank account. I am sure of that.

Mr. Shelton: Mr. Reporter, would you read that next to the last question and answer, please?

(The record was read.) [890]

Q. (By Mr. Shelton): Do I then understand that your testimony is that there is no relationship between the \$5,000 deposit in the wife's bank account and the \$5,000 withdrawal from your personal account?

A. I said just exactly the opposite.

Q. The record will show what you said, Mr. Olender. What do you now say?

A. Read the record.

Q. I ask you again, Mr. Olender, whether there is any tie-in between these two items?

A. I said I believe there was.

Q. What is the tie-in?

A. I believe that I drew a check on my personal account, that is to the best of my knowledge, and deposited it in my wife's bank account. I am not sure, but that is what I believe.

(Testimony of Milton H. Olender.)

Q. Is it now your testimony that \$3,000 of that money was or was not money of your mother-in-law's, Mrs. Foote? A. It was.

Q. It was money of your mother-in-law's, Mrs. Foote? A. That's right.

Q. And under what circumstances did your mother-in-law give you that \$3,000?

A. Part of it came from Mrs. Widrin, as she testified, and I had the balance and I had the money in my safe deposit box. [891]

Q. Mr. Olender, I will ask you whether it is not true that you had a conversation with Mr. Ringo concerning this \$3,000 item which you say you received from your mother-in-law, Mrs. Foote?

A. I don't remember.

Q. I will ask you whether or not you didn't have a conversation with Mr. Ringo, the substance of which was as follows:

“Mr. Olender stated that his wife had secured some money from her mother, who is now deceased. I (that is Mr. Ringo) told him that that could be proved as he could then show the probate of the mother-in-law's estate.”

Mr. Hagerty: If your Honor please, I am going to object to this type of cross-examination. This is an attempt to put before the jury an unsigned statement.

I think the proper way would be to ask the witness the question. If he can't reproduce the witness and have the witness Ringo testify from the stand——

(Testimony of Milton H. Olender.)

The Court: This is Mr. Ringo's statement, apparently.

Mr. Shelton: It is, your Honor, and we are laying a foundation to call Mr. Ringo if Mr. Olender denies the conversation.

The Court: All right.

Mr. Hagerty: Then I object to it as being an improper method of impeachment. I ask that he show the statement to [892] the witness on the stand.

Mr. Shelton: (Handing document to Mr. Hagerty.) Go over to the next page, Mr. Hagerty.

The Court: Preliminarily will you indicate the time, place.

Mr. Shelton: Your Honor, the time and place are not precisely indicated. It was evidently some time toward the end of the time Mr. Ringo was working on his audit of Mr. Olender's tax affairs.

The Court: And the conversation refers to a conversation between this defendant and Mr. Ringo?

Mr. Shelton: Yes, your Honor.

The Court: Who was present at that time?

Mr. Shelton: So far as the Government knows, only Mr. Ringo and Mr. Olender. We can ask Mr. Olender——

Mr. Hagerty: I would object to this type of examination, too, your Honor, on the grounds it is hearsay and in no way binding upon this defendant. This is a statement made by the witness Ringo out of the presence of the defendant to the revenue agents.

(Testimony of Milton H. Olender.)

The Court: Relating, however, to a conversation purportedly had by Ringo with the defendant.

Mr. Hagerty: Yes, and I think the proper way to produce it would be to put the witness Ringo on the stand to testify, so we have the opportunity to cross-examine him. [893]

The Court: The examiner may so direct his questions to the witness as to refer to the time and the colloquy, the conversation that occurred between Mr. Ringo and this witness.

You can do that by couching the questions.

Mr. Shelton: All right.

The Court: Asking whether or not he had a conversation with Mr. Ringo of the following nature, to wit—

Mr. Shelton: All right.

Q. Mr. Olender, I will ask you whether or not you had a conversation with Mr. Ringo, the substance of which was as follows:

That you stated that your wife had secured some money from her mother, who at that time was deceased; that you told Mr. Ringo—that Mr. Ringo told you that that would be easy to be proved from the probate of the mother-in-law's estate. That you said that there wasn't any estate but that your mother-in-law wanted to secure a pension from the State of California and she could not secure such a pension if she had any money; she therefore withdrew the money—this is what you told Ringo—from her bank account and gave you the cash and you put it into your safe deposit box. And after your

(Testimony of Milton H. Olender.)

mother-in-law died you opened a bank account with the personal funds in the wife's name.

Did you or did you not have such a conversation with [894] Mr. Ringo?

A. I may have. I have no recollection of it.

Q. Mr. Olender, I will ask you whether you recall an occasion in the year 1945 or 1946 when you purchased some shoes from the Los Angeles office of the Boston Shoe Company and re-sold those same shoes to Montgomery, Ward & Company?

A. No, sir, I have no recollection of ever having sold anything to Montgomery, Ward & Company.

Q. You have no recollection that during the years 1945 or 1946—

A. If I did, I have not the slightest recollection of Montgomery, Ward ever buying anything from me.

Q. Mr. Olender, there has been very considerable testimony in this record concerning your use of cash, has there not? A. Yes, sir.

Q. There has also been very considerable testimony in this record concerning your use of cashier's checks for various purposes, has there not?

A. Yes, sir.

Q. Is it not a fact that you were, during the years 1944, 1945, 1946, a man of rather substantial means?

Mr. Hagerty: Objected to as calling for the conclusion and opinion of the witness, your Honor.

(Testimony of Milton H. Olender.)

The Court: Overruled.

A. Yes, sir. [895]

Q. (By Mr. Shelton): Is it not also a fact, Mr. Olender—showing you here the ledger of your personal bank account, defendant's Exhibit AC—that that personal bank account of yours was relatively inactive, there were not very many transactions in it?

Mr. Hagerty: I will object to that, your Honor. The bank account speaks for itself. It is an exhibit that explains itself completely.

The Court: Overruled.

A. I don't find over seven entries a month at any time.

Mr. Shelton: If the Court please, I will ask that this be passed among the jury.

The Court: Yes.

(Defense Exhibit AC passed to the jury.)

Q. (By Mr. Shelton): Mr. Olender, why was it that a man of your means would do business so largely in cash and cashier's checks when he had bank accounts?

A. A man of my means at the present moment is issuing nothing but cashier's checks.

Q. What is the purpose of that, Mr. Olender?

A. Because the Government has a lien on all my bank accounts and I can't do anything but cashier's checks.

Q. But during the period we were talking about here the same thing obtained, did it not, that you

(Testimony of Milton H. Olender.)

were doing relatively small business with your personal account and a relatively [896] large business in cash, in cashier's checks as shown by the evidence in this case?

A. I don't know. Some people ask for cashier's checks as Barney's letter shows. They wanted them.

Mr. Shelton: I move that be stricken, your Honor.

The Court: That may go out.

Q. (By Mr. Shelton): Will you answer the question?

A. Will you repeat the question, please?

Mr. Shelton: Mr. Reporter, will you read the question back, please?

(The record was read.)

Mr. Hagerty: If your Honor please, I think that answer was proper. It was on cross-examination that he asked for it. He said that some of the people demanded cashier's checks and that was evidenced in the letter in one of the exhibits.

The Court: I suppose that is an answer, some of the people demanded them.

Mr. Shelton: All right, your Honor.

Mr. Hagerty: May that answer be reinstated in the record, your Honor?

The Court: Yes.

Q. (By Mr. Shelton): Mr. Olender, I will ask you whether or not you were an honor graduate of the University of California when you attended that institution? [897]

A. Yes, sir, I was.

(Testimony of Milton H. Olender.)

Q. Can you tell the ladies and gentlemen of the Jury what those honors consisted of?

A. You just took an honor course in your senior year in your major subject. My major subject was economics. I wrote a treatise on the Refunding of Bond Issues of the United Railroads in 1905. It was my thesis, and as a result of that thesis being satisfactory, I was given honors in economics.

Q. Mr. Olender, I would like to ask you about the payments of your personal expenses during the years 1945 and '46, which are the two years in this case.

How did you pay your grocery bills in those years?

A. I don't remember.

Q. Did you pay them by cash or by check?

A. I had no charge accounts.

Q. You had no charge accounts? A. No.

Q. What about the accounts that you had with these various department stores; first, Magnin's; did you usually pay your Magnin's bill?

A. I never paid the bills.

Q. Who paid them, Mr. Olender?

A. I presume my wife or daughter did. I don't know.

Q. Do you know whether they were paid by cash or check? [898]

A. I don't know how they were paid.

Q. Did you pay any of the W. & J. Sloane's obligations in 1945 or '46?

A. I believe I made a deposit in 1945, a cash

(Testimony of Milton H. Olender.)

deposit. They asked for it when I first went there and I gave it to them.

Q. Of how much?

A. I believe a thousand dollars. I didn't have my check book with me and they wanted a deposit and I gave them that money.

Q. I will ask you whether or not you customarily carried as much as a thousand dollars in your pocket at that time? A. I did.

Q. How much did you usually carry in your pocket?

A. I don't remember, but I never had less than a thousand dollars.

Q. How did you pay the Gray Shop during the years 1945 and 1946?

A. I did not pay any of my wife's charge accounts personally.

Q. Who paid your automobile charges in those years, expenses such as gasoline, automobile repairs and similar expenses?

A. Those were all paid by check from the store.

Q. Those were paid by check on the store account? A. Yes. [899]

Q. And were they then charged to your personal account? A. No, sir, they were not.

Q. In other words, was it treated as an operating expense of the store?

A. Part of it. Mr. Ringo handled that and took a certain part for—I don't know—I believe a half or something like that, and then took depreciation,

(Testimony of Milton H. Olender.)

and figured out just how much was business and how much wasn't.

Q. What about the part of the gasoline expense that represented personal travel as contrasted with business travel, how was that paid?

A. Well, there was practically no personal travel. It was all business, except going to and from my home.

Q. Mr. Olender, when did you first start doing business with Money Back Smith?

A. Oh, perhaps as far back as 1928.

Q. 1928. Will you state whether or not you did business with Money Back Smith substantially continuously over the period 1928 to 1944?

A. Not very much until the war started. Very little between 1928 and '44. '41 and '42—about 1941 I started.

Q. Then I will ask you whether beginning about 1941 you started to do business rather frequently with Money Back Smith? A. I believe I did.

Q. To the best of your recollection about how much would you [900] have bought from that concern in 1942? A. I wouldn't have any idea.

Q. Well, you had established, had you not, a rather clear-cut business relationship with Money Back Smith; they knew you and you knew them?

A. That's correct.

Q. And in the year 1944, specifically, I will ask you how you paid Money Back Smith for merchandise, in cash or in check? A. Both.

Q. Which represented most of the transactions?

(Testimony of Milton H. Olender.)

A. I don't know.

Q. What was the reason for paying partly cash and partly in check?

A. Something that they wanted, for some reason—I don't remember. I knew that all cash transactions were shown on my books.

Mr. Shelton: That's not responsive. Your Honor, may that go out?

The Court: It may go out.

Q. (By Mr. Shelton): What was the reason for making some cash payments?

A. You are asking me a question eight years old. I don't remember, Mr. Shelton.

Mr. Hagerty: I will object to the question, too, your [901] Honor, as being asked and answered. He said he didn't remember, that they requested it.

The Court: Well, that is the answer.

Q. (By Mr. Shelton): During the year 1944, Mr. Olender, is it your testimony that such cash payments as were made on the Money Back Smith account were made by you personally?

A. Yes.

Q. To whom in that concern did you make those payments?

A. They would be made to the cashier, the girl at the window who had charge of receiving the payments.

Q. When you would make a payment to that girl, would you get a written receipt?

A. I did.

Q. Do you have those receipts at present?

(Testimony of Milton H. Olender.)

A. I can't find them, Mr. Shelton. I looked very diligently, because it is to my advantage. I have the Smith card, all of the invoices, together, and I tried to bring them here, and I would be very happy if I could find them, and I am going to look again tonight, if it takes me all night to find them.

Q. You were in Court yesterday, were you not, when your former bookkeeper, Mrs. Manger, testified? A. Yes.

Q. I will ask you whether or not your bookkeeper, Mrs. Manger, did not indicate that her belief was that some of these transactions between you and Smith were personal transactions? [902]

A. Oh, no.

Q. There is no such indication in her testimony?

A. No, no, sir.

Q. Mr. Olender, I believe the testimony yesterday was that many, if not all, of those purchases from Money Back Smith in the year 1944 were made about February and March, is that correct?

A. I believe so.

Q. And I believe the testimony also was that the entries, to put that on the records of your store, were made at the end of the year 1944?

A. That is correct.

Q. What was the reason for that nine or ten month delay in entering those purchases on your record?

A. I couldn't tell you that now. I don't remember. I only know they were entered.

(Testimony of Milton H. Olender.)

Q. Were they entered on the records at the end of the year because you only then gave the information to Mrs. Manger?

A. That could be true. Manger is her name.

Q. Manger. Pardon me. You say that could be true.

A. That could be. I don't remember.

Q. Is that your best recollection?

A. It is, yes.

Mr. Shelton: No further questions. [903]

Further Redirect Examination

By Mr. Hagerty:

Q. Mr. Olender, I will show you the Government's Exhibit No. 29 in evidence, which purports to be a ledger card from I. Magnin & Company in the name of Olender, Mr. M. H., and Betty, 121 Alpine Terrace, Oakland, with typewriting in red lettering, "Okay daughter Sue to charge," or something like that (handing to witness).

A. Yes, sir.

Q. At the time of the existence of that account was your daughter living at your home?

A. Yes, she was.

Q. How old was she?

A. She is twenty-five now. So this was 1946, that would be seven years ago, she would have been eighteen years of age.

Q. Was she regularly employed on the outside?

A. Yes, she was.

(Testimony of Milton H. Olender.)

Q. Was she self-supporting?

A. No, she lived at my home.

Q. Did she turn her earnings over to you?

A. No, she did not.

Q. What did she use her earnings for, to your knowledge?

A. I don't know. She just did whatever she wished with her money.

Q. Well, did she make any of the purchases that are represented on that account that you know? [904]

A. I don't know, but I believe she must have.

Q. At any rate, did you pay for anything that she was charged with?

A. I didn't even know these charge accounts existed.

Q. Now the Government has in evidence Exhibits 30 through 34, I believe, or 33—yes, Exhibits 30 through 33, which are forms of the Treasury Department which are to be reported in by banks when transactions occur involving greater sums than a thousand dollars in cash.

Now, could you take these exhibits—take Exhibit 30, read what the transaction is to the jury and explain to the jury where you got the money for the transaction.

A. Well, there is one cashier's check for \$10,000, and one cashier's check for \$15,000.

It says, "Issue"—or no,—"Currency involved," I should say, "\$10,000" and "\$15,000," and it says,

(Testimony of Milton H. Olender.)

“Issued cashier’s checks for amounts paid with entire cash. Purpose to buy bonds.”

Then on November, 1945, there is \$25,000 “Issued cashier’s check. Paid cash. For purchase of bonds.”

Q. Now where did you get the funds to start that transaction?

A. Well, the December 5 money came from my safe deposit box, and, I believe—I am not sure—I believe that is the date that I purchased my mother’s bonds.

The November, 1945, \$25,000, came from an Army & Navy [905] Store check which I had cashed that day and gotten 250 \$100 bills, as shown by another one.

Q. Yes. You are now—you are not referring to Exhibit 30 now, are you?

A. No, but it has that date on here.

Q. Well, restrict your descriptions now to Exhibit 30, and I will give you the other exhibits in due course. A. All right.

Q. You—— A. They are both on this one.

Q. Well, I will show you Exhibit 31 in evidence, which involves the sum of \$25,000 (handing to witness).

A. Yes, that’s the same one. Yes.

Q. Well, the same transaction or separate transaction?

A. They must be the same transactions.

(Testimony of Milton H. Olender.)

Q. Those two forms represent the same transaction?

A. There are two on that first one and evidently one of them is a repetition of the other one.

Q. There are different dates on them, aren't there?

A. No. One has November, and the other has November 20. I believe it's a duplicate report of the same transaction.

Mr. Shelton: Your Honor, we would ask what he believes go out. That's a conclusion of the witness.

The Court: That may go out.

Q. (By Mr. Hagerty): Well, I will ask you this, Mr. Olender, [906] do you recall making two transactions involving \$25,000 for the purchase of bonds—

A. Yes.

Q. —in the month of November?

A. No, just one.

Q. Just one transaction in that month?

A. Yes.

Q. And then there was a subsequent transaction in—

A. December.

Q. —December? A. Yes.

Q. I will show you U. S. Exhibits 32 and 33 and ask you to examine them and if you can now tell us where the funds came in those transactions?

A. I don't remember this particular one. It's for a thousand dollars and \$1,500. It doesn't come to my mind what it was for.

(Testimony of Milton H. Olender.)

Q. You say there is a transaction here for \$1,500?

A. \$1,000 and fifteen hundred. I don't remember those. I can check on those. But I just haven't seen these except in evidence, and I don't know what they are. I know what the next one is.

Q. That's the item of \$3,000 on May 29, 1946?

A. That is correct.

Q. Government Exhibit No. 33? [907]

A. Yes, sir.

Q. Can you tell us where that came from?

A. About the 20th of May, somewhere in there, I had received a check from the title company in Fresno for the sale of my Fresno home in the amount of—and the amount of that check was \$56.59—I am sorry—\$5,659.66, as reported in my income tax return.

I cashed that check or deposited part of it in my personal account on May 28th, 1946, and I deposited \$2,659.66.

I then got from Mr. Seele, I am sure, because he was the only one who handled large bills there, three \$1,000 bills, and I don't know if I bought a cashier's check or whether I used the three \$1,000 bills and made that deposit to my wife's personal account since she had invested part of her money in the Fresno home when we bought it.

Mr. Shelton: Mr. Hagerty, does the record show what year that was? I lost track of it.

A. 1946.

Mr. Hagerty: 1946.

(Testimony of Milton H. Olender.)

Q. May 29, is it?

A. Yes. That was the date I made the deposit in my personal account and it may have been the next day that that deposit was made, either by me or my wife, in her savings account. That is the \$3,000 deposit which is shown in her savings account. [908]

Q. (By Mr. Hagerty): Now there is an annotation on this Exhibit 32 in red pencil to the effect, "This case referred to revenue agent by S. A. Blanchard."

Do you know what that would mean?

A. No, I don't. I haven't the slightest recollection of that particular transaction.

Q. That's the one involving—

A. \$2,500 altogether.

Q. \$2,500. Is Blanchard the name of the first revenue agent—

A. He is the gentleman who was investigating Mr. Goodman.

Q. Mr. Olender, after refreshing your memory there from the books and your checking account and your bank book, can you explain or interpret for us the transactions indicated on U. S. Exhibit No. 31, the two items of \$25,000?

A. Yes. The first one, as I explained before, I had cashed an Army & Navy Store check, received \$100 bills for it, and the next day bought a cashier's check to buy bonds with.

The second \$25,000 is the \$10,000 I deposited in

(Testimony of Milton H. Olender.)

my personal account, and the three \$5,000 trustee accounts I set up for my children.

Q. Calling your attention to defense Exhibit AG in evidence, three deposits slips under date of November 20, 1945, setting up trustee accounts for your children—is that your [909] interpretation?

A. Those are the three I am referring to.

Q. Of that transaction——

A. Yes, I believe so. And my personal bank account shows a \$10,000 deposit on that same day.

Q. Now there are various deposits indicated in your wife's bank book which I believe is in evidence here, Exhibit No.——

A. No, it's the small red book.

Q. Well, referring to your wife's bank book—I don't know just where it is—here it is——
Defense Exhibit T. Is this it? A. Yes.

Q. Can you explain to us the entries in there with which you are familiar?

A. Well, I have explained the first \$5,000 entry. I also explained the \$3,000 from the sale of the Fresno home. And the last \$2,000 entry was from the sale of the furniture in my Fresno home, which my mother handled and brought the money to me, and I just put it in my wife's account.

Q. Mr. Olender, have you seen the Schedule A, which we, through the accountant, have prepared?

A. I have seen it, but I haven't studied it, Mr. Hagerty.

Q. I see. I just give it to you to refresh your memory with reference to an item in November

(Testimony of Milton H. Olender.)

indicating the purchase of Treasury bonds—two and a quarter per cent Treasury bonds, [910] 1956-62 issue, in the amount of \$5,000.

Do you recall having had such a transaction?

A. Yes, I do.

Q. From what source did those funds come?

A. From the safe deposit box.

Q. The safe deposit box? A. Yes.

Q. Yesterday under cross-examination, Mr. Olender, you told us about the leasing arrangements of the Fresno property, the Olender building in Fresno. A. Yes, I did.

Q. And how the rentals, rent payments were made by the tenants in a divided method; in other words, they prepared checks for you and the other heirs. Is that correct? A. That is correct.

Q. The other owners of the building?

A. Yes.

Q. Are the provisions for such rental payments covered by clauses in the leases that you have executed with those tenants?

A. They are in every lease, yes, sir.

Q. I show you here, Mr. Olender, a lease, and ask you if you can identify it.

A. This is a lease between the members of the partnership—at that time my mother was still alive—and is dated April [911] 23, 1951, and it is made out in the names of Esther Caplan, Martha Olender Hamilton, Mrs. Julius Olender, and Milton Olender, to Robert William Turpin and William R. Turpin. Clause 29—

Mr. Drewes: I will object to any reading from that document, your Honor.

(Testimony of Milton H. Olender.)

A. It is what he asked me.

Mr. Drewes: It is not in evidence.

Mr. Hagerty: This is in support of the direct testimony of the defendant, your Honor. It shows the clause which provides for payment in that divided method on the rentals.

Mr. Drewes: The record doesn't—may I ask that counsel's comments be stricken, and the jury admonished to disregard them?

The Court: Let us see what it is. Let us see if it has any relevancy. You may read it. If it hasn't any relevancy—would you read it, Mr. Olender?

A. Yes, sir. Clause——

Mr. Drewes: It is a 1951 lease, your Honor.

A. I have another one.

The Court: If it hasn't any relevancy, I will strike it, and the Jury ignore it. I can't anticipate what it is.

A. Clause No. 29:

“It is hereby agreed that lessee shall mail or deliver the rentals to the above-mentioned [912] lessors in the following manner:

“Namely one-fourth, \$75, to Esther Caplan, 2167 16th Avenue, San Francisco, California; one-fourth, \$75, to Martha Hamilton, Hotel Travelers, Fresno, California; and one-half, \$150, to Mrs. Julius Olender, Hotel Travelers, Fresno, California (for Mrs. Julius Olender and Milton Olender share.)”

The Court: That merely shows the allocation.

Mr. Hagerty: That was asked of him on cross-

(Testimony of Milton H. Olender.)

examination yesterday, your Honor. This is merely corroborative of his testimony so that we have in effect a leasing arrangement evidenced by that document showing that that was——

Mr. Drewes: The testimony——

Mr. Hagerty: ——the division of the rents.

Mr. Drewes: The testimony elicited yesterday concerned the years 1944, 1945. This document which has now been read from is the 1951 lease. I wish to object on the ground that it is immaterial, irrelevant, incompetent.

The Court: Was the same situation prevalent in the years—in the earlier years?

A. Always. It has always been that way. I can bring an earlier lease, if it is so desired.

The Court: It is substantially the same?

A. Substantially. [913]

Mr. Drewes: That was his testimony of yesterday. I see that there——

The Court: I will provide an opportunity to bring an earlier lease.

A. I will be happy to do that.

The Court: All right.

Q. (By Mr. Hagerty): Yesterday, Mr. Olender——

The Court: In the interval it may be stricken from the record. Bring an earlier lease, if you have one.

Q. (By Mr. Hagerty): Do you have one?

A. I have a lease for the period in question, yes, sir.

(Testimony of Milton H. Olender.)

Q. Mr. Olender, yesterday you outlined upon cross-examination to Mr. Shelton the methods by which you paid the expenses of maintenance of that building down below in Fresno? A. Yes, sir.

Q. I have just shown you a couple of check books.

I should show them to counsel.

(Showing to Government counsel.)

Q. (By Mr. Shelton): If your Honor please, I don't want to be anticipatory in this matter, but I do want to indicate the Government's position.

It appears that these books again are 1951 books, and the recollection of the Government attorneys is that Mr. Olender testified yesterday that his records for the years [914] '44 and '45 were the ones involved and are not now available, and on that basis the Government would respectfully submit it is improper to question on the 1951 checks.

Mr. Hagerty: Well, if your Honor please, this involves an inquiry into this man's course of conduct, and he has testified under oath as to what he did. This is merely corroborative of that, in showing that that same course of conduct still prevails in the administration of this building, and for that purpose I think it becomes then a matter of credibility and the weight to be placed upon the testimony by the jury.

Mr. Shelton: I think, your Honor, the fact that the practice may have been in effect recently does

(Testimony of Milton H. Olender.)

not indicate it was in the earlier period, particularly going back some seven years.

The Court: I think it might be offered as the subject of testimony to correlate the present with the past by testimony.

Mr. Hagerty: Yes, your Honor, and then the witness has testified under oath already that that was his course of conduct at the time in question.

A. Your Honor, I can bring those earlier records. It's just the same thing. I will bring the earlier check books, if I can find them. The same thing was done during the periods under question here. I didn't know that that was [915] necessary. I would have brought them today.

Mr. Hagerty: Well, if he does find the earlier books, can we put them in at that time?

A. I can find them.

Q. (By Mr. Hagerty): However, Mr. Olender, you outlined to Mr. Shelton on cross-examination the exact manner in which you maintained this building, that is, providing for the expense and then separating and dividing the income?

A. That's correct.

Q. Is that true? A. Yes.

Might I add a little note here, your Honor?

The Court: Yes.

A. I received a check this morning from one of my tenants, and it was unsigned.

Q. (By Mr. Hagerty): Mr. Olender, now you have been under examination for quite a period of time? A. Yes, sir.

(Testimony of Milton H. Olender.)

Q. And there probably are some things I may not have asked you that I want to ask. But I want to ask you this question. In preparing your income tax returns for the years involved, 1946 and 1945, that are under question in this indictment, did you feel that you had truthfully reported all of your income that you should have reported?

A. When I signed that under oath, I did. [916]

Q. Did you ever have any intent to evade the income tax laws of the United States?

A. I did not.

Mr. Hagerty: No further questions.

Mr. Shelton: Your Honor, may we suggest the usual morning recess?

The Court: Take the recess, with the same admonition, ladies and gentlemen.

(Short recess.) [917]

Mr. Shelton: If your Honor please, the Government has no further questions of Mr. Olender.

Mr. Hagerty: I have just one or two.

Redirect Examination

By Mr. Hagerty:

Q. Mr. Olender, I show you a part of a sailor's uniform and ask you if you can identify it?

A. I can. That is one of the suits that came in from Seagoing in 1945 at \$18.00.

Q. At \$18? A. Yes.

Q. Yesterday on cross-examination you were asked certain questions in reference to the quality

(Testimony of Milton H. Olender.)

of the uniforms and the difference in the prices of them? A. Yes, sir.

Q. Can you tell us about the quality of that uniform?

A. Pardon the use of the word, but this is known as a "lousy gabardine."

Q. What size is that?

A. Size 34. It comes—the pants are not 34—it comes with a 34 blouse.

Q. I show you a blouse. Is this the blouse that goes with it, or is this it (indicating)?

A. No, this is it (indicating).

Mr. Hagerty: At this time, if your Honor please, I would like to offer this in evidence. [918]

The Court: What is the purpose?

Mr. Hagerty: The purpose will be to demonstrate the differences in size and showing the difficulty—I have another which I haven't offered yet—well, I will withdraw the offer at this time and let him identify this.

Q. (By Mr. Hagerty): I show you an additional pair of sailor pants and ask you if you can identify them? A. Yes, I can.

Q. Will you tell us the quality and size of that?

A. This is serge metcalf, the type most sailors want done.

Q. And what size is it?

A. It comes with a 42.

Q. Do you happen to have this in stock now?

A. This is a piece of current merchandise which

(Testimony of Milton H. Olender.)

I am buying at the present time. I have two size 42's holding in my store.

Q. You have two? A. Two uniforms.

Q. Two uniforms in your entire stock, is that right? A. Yes.

Q. Why is that?

A. You don't sell the large sizes very often, as I have stated. Might be an occasional sailor, he is that big. [919] Usually when they are that big they are admirals.

The Court: A little more prosperous when they are admirals?

A. Yes, sir.

Q. (By Mr. Hagerty): This is size 42, is that correct, large size? A. That is correct.

Q. Now, what are the problems involved in reducing or attempting to reduce or adjust a pair of trousers like this to fit a sailor who would wear a pair of trousers of this size?

A. I wouldn't attempt to fit a sailor to wear that. This would go for a pair 42, 37 or 8. You couldn't go lower than that,—42. You could have the pockets meeting with the one pocket instead of two and that would probably be in the middle of the back. You would also have the problem of cutting down the blouse, which is a very difficult operation.

Q. Is that more difficult than the trousers?

A. It is a much more detailed job, yes. The sleeves have to be shortened—

The Court: You may mark it for the purpose of illustration, Mr. Hagerty.

(Testimony of Milton H. Olender.)

Mr. Hagerty: Thank you, your Honor. I will offer all of them, blouse and trousers, too. [920]

The Court: The size again?

A. The size comes in gabardine, a size 34 blouse and about 28, 29 trousers. The other is a 42 blouse and about a 38 waist.

The Court: Yes?

The Clerk: Defendant's Exhibit A-1 in evidence.

(Thereupon a uniform was marked Defendant's Exhibit A-1 in evidence.)

Q. (By Mr. Hagerty): These uniforms when they are delivered to you arrive in boxed forms but turned inside out, is that right?

A. That is true. The first ones didn't arrive in boxed form. Back in 1944, during the war, there was a box shortage and you got them in cartons, but I have since used cartons which are empty to put in those older suits.

Mr. Hagerty: This is the blouse, the smaller one (handing article to the Clerk), the gabardine trousers. No, I believe this is the one. This looks like the smaller.

The Witness: That is the smaller.

Q. (By Mr. Hagerty): This is the gabardine—this is the Saraga suit? A. No, Seagoing.

Q. Seagoing, rather. And this is the large [921] one.

Mr. Hagerty: I guess I can hold them up so the jury will see the size of the larger one. It is a pretty big man, takes a pretty big man to fill this

(Testimony of Milton H. Olender.)

up. See, it is already right on the ground now. And the average sailor is not quite that large, I guess. No further questions.

Mr. Shelton: No further questions on behalf of the Government, your Honor.

Mr. Hagerty: You may step down, Mr. Olender.

(Witness excused.)

Mr. Hagerty: Now, at this time, we will call Mr. Hyman.

ARTHUR HYMAN

called for the defendant, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. Arthur Hyman.

Q. Spell your last name.

A. H-y-m-a-n. 51 King Avenue, Piedmont.

The Clerk: What is your occupation?

A. Partner in the Dorfman hat and cap company.

Direct Examination

By Mr. Hagerty:

Q. Mr. Hyman, will you tell the ladies and gentlemen of the jury and his Honor your occupation?

A. My occupation is a partner in the company, Dorfman Hat and Cap Company. I do everything in connection over there to transact business over there. I am a third partner. [922]

(Testimony of Arthur Hyman.)

Q. What is the nature of the business?

A. A wholesale headwear and other small items, rain clothing, similar items.

Q. From time to time do you deal in merchandise like sailors uniforms like these things that are in evidence here, Defendant's Exhibit AJ, in evidence?

A. I did.

Mr. Shelton: If your Honor please, could this question as to the nature of the business be restricted to the period involved here? I think 1944, 1945 and 1946 are the years we are concerned with.

Mr. Hagerty: Yes. I will withdraw any pending question and say this to you, Mr. Hyman:

Q. (By Mr. Hagerty): During the years 1944, 1945, 1946, was your business the same as it is today?

A. In 19—what do you mean by that?

Q. Well, maybe it's a little bit confusing. I will withdraw the question and ask it this way: Were you engaged in the wholesale merchandise business in 1944, 1945?

A. Yes.

Q. 1946?

A. Yes, sir.

Q. Under the same name and firm?

A. Yes, sir. [923]

Q. Your firm name is Dorfman Hat Company?

A. Yes.

Q. At that time did you know the defendant, Milton Olender, who sits there (indicating)?

A. Yes, sir.

Q. And from time to time did you do business with him?

A. Oh, yes.

(Testimony of Arthur Hyman.)

Q. Did you know a girl by the name of Vera Manger?

A. She was my bookkeeper for a number of years.

Q. I see. And did she enter into the employ of the defendant, Mr. Olender, by and with your permission?

A. She would go out of there a short time in the afternoon or when she had her work caught up, maybe, once or twice a week.

Q. Directing your attention to the year 1944, did you ever do any business with a firm or man by the name of Goodman? A. Yes, sir.

Q. What sort of business did you do with him?

A. I bought from him the sailor ties, sailor suits—that is it.

Q. Sailor suits. Now, did you have any complaint about the quality or size of the sailor goods that you received from him?

A. I bought a lot of goods from him. There was a demand [924] for the merchandise. Still, some of it was so bad that I can recall once we returned quite a very large sum. Could have been 130 or 40 suits, I think.

Q. Did you make complaint to Mr. Goodman about the quality of these goods?

Mr. Shelton: Object to—I object to that, if your Honor please. This is a collateral line of inquiry as to the goods received by this witness and his firm from Goodman. It isn't part of the evidence

(Testimony of Arthur Hyman.)

in this case, and we ask that the former question be stricken.

The Court: What are you leading to, counsel?

Mr. Hagerty: This is what I am leading to your Honor: The whole chief crux of the Government's case is the Goodman transaction with the defendant. We are trying to show by this evidence that the same complaint was true of the goods he received from Goodman as the complaint the defendant had about the goods and suits.

Mr. Shelton: That is objected to.

The Court: This gentleman testifies, as I get it, to inferior merchandise, is that correct?

A. Yes, sir.

The Court: That has nothing to do with size.

Mr. Hagerty: I was leading up to this.

Q. (By Mr. Hagerty): Did you have a complaint about the size you received, Mr. [925] Hyman? A. We did have complaints.

Q. And was there a demand at that time for large size sailor suits or small size sailor suits?

A. The principal demand was for smaller sizes. The sailors going into the service were young men who weighed, I would say, 150 or 60 pounds maximum, and the principal sale was 34, 35, 36, 37, 38 and we sold some 39's and 40's, 42 a few.

Q. But the principal volume was in the smaller sizes?

A. The principal demand was for that size, the smaller sizes that we had.

Q. Mr. Goodman was sending out inferior quality goods and large sizes?

(Testimony of Arthur Hyman.)

Mr. Shelton: Just a minute.

The Court: Sustained. I will sustain it.

Q. (By Mr. Hagerty): You have testified, Mr. Hyman, that you had complaint with the material you received from him?

Mr. Shelton: Objected to, if your Honor please, same line of objection.

Mr. Hagerty: What is the ground?

Mr. Shelton: On the ground that the inferior type of merchandise is outside the scope of the evidence of the case, and I believe his Honor overruled it.

The Court: Yes, that is true. [926]

Mr. Hagerty: All right.

Q. (By Mr. Hagerty): I will direct you to the sizes. You did have complaint about the sizes, is that correct, Mr. Hyman? A. I think so.

Mr. Drewes: We ask that that be stricken, your Honor, as not responsive.

Q. (By Mr. Hagerty): Mr. Hyman, you can't think about it.

The Court: It may go out.

Mr. Hagerty: You have to answer yes or no.

The Witness: Complaints?

Mr. Hagerty: About the sizes?

A. Yes, sir.

Q. (By Mr. Hagerty): You have in connection with the Goodman transactions had investigators at your place checking your books, from the Government, is that right? A. Yes, I have.

Q. Everything you have told us here you have

(Testimony of Arthur Hyman.)

already told to the Government agents, is that true?

A. I think so.

Mr. Hagerty: You may cross-examine. Oh, there is one other question I might ask:

Q. (By Mr. Hagerty): Did you have a problem in dealing with Mr. Goodman on his failure to send invoices with the [927] merchandise and delivery?

The Court: Objection sustained.

Mr. Shelton: Objected to as immaterial.

Mr. Hagerty: That is part of the Government's case against this defendant, your Honor.

The Court: Sustained.

Cross-Examination

By Mr. Shelton:

Q. Mr. Hyman, I believe it is a fact that you stopped delivery of these sailor suits about June of 1944?

A. Yes, sir; June, 1944; July, 1944; yes, somewhere around there.

Q. Approximately that time? A. Yes.

Q. That means that approximately the latter half of the year 1945 and the year 1946 your concern was not handling the sailor suits?

A. I wasn't in the sailor suit business around then.

Q. So that the testimony that you have given is limited to the first half of the year 1944?

A. That's right. It would be maybe July, August. I doubt if it was August.

(Testimony of Arthur Hyman.)

Mr. Shelton: Will your Honor indulge me a moment?

Q. (By Mr. Shelton): Mr. Hyman, in response to the request of the government special agents yesterday or the day [928] before, you did produce some correspondence from your files, did you not, sir?

A. I gave them quite a lot of papers in the Goodman transaction which showed a number of sailor suits and tie transactions and sailor hats.

Q. And we were looking at some of that correspondence upstairs in the United States Attorney's office this morning, were we not? A. Yes, sir.

Q. And isn't it true that at that time we saw some correspondence relating to the delivery of larger size, 40's, 42's and 44's? A. Yes, sir.

Q. Didn't that correspondence indicate that during the first six months of the year 1944 there were being larger sizes shipped out to your concern from Goodman? A. Yes.

Q. And wasn't there similar supporting testimony and invoices that we looked at up there this morning, that although there were many more of the smaller sizes being shipped, there were larger sizes, 40's, 42's and 44's being shipped to your firm in the first six months of 1944 by Goodman?

(Testimony of Arthur Hyman.)

A. I believe so.

Mr. Shelton: You may examine, Mr. [929] Hagerty.

Q. (By Mr. Hagerty): We have no questions. You may step down, Mr. Hyman.

The Court: Witness excused.

(Witness excused.)

Mr. Lewis: At this time, your Honor, we will recall Mr. Hellman.

The Clerk: Mr. Hellman, please. Repeat your name for the record.

The Witness: Roland Hellman.

ROLAND HELLMAN

recalled for the defendant, having been previously sworn, was examined and testified further as follows:

Mr. Lewis: Your Honor, at this time I have again schedules 3, 3A and 4, which is the defendant's computations of net worth.

The Court: Well, that is the revised schedule?

Mr. Lewis: These are the revised schedules.

The Court: I have examined them before, I think.

Mr. Lewis: Yes. The revised parts of the schedule just take up the matter of the Fresno rents, the Olender-Elkus bank accounts, the Olender McGrete bank account, I believe are the changes.

Mr. Shelton: Mr. Lewis, can you speak a little louder? It is difficult to hear you.

(Testimony of Roland Hellman.)

Mr. Lewis: All right. Have you a copy of this schedule, [930] Mr. Hellman?

The Witness: Yes, sir.

Direct Examination

By Mr. Lewis:

Q. Mr. Hellman, you have read all the entire transcript in this case? A. Yes, sir.

Q. You personally went to the Bank of America and examined these deposits of the taxpayer?

A. Yes, sir.

Q. You have gone through the Exhibits in this case? A. Yes, sir.

Q. And these schedules that you have made up are your accounting interpretations of the testimony and the Exhibits of this case, what they show? A. That is correct.

Mr. Lewis: Your Honor, I would like to have these passed out to the jury at this time, and we will take them up again item by item.

The Court: Very well, I suggest you offer them first.

Mr. Lewis: Yes, I will offer them.

The Court: They may be marked.

The Clerk: Defendant's Exhibit 8A in evidence.

(Documents referred to were admitted into evidence as Defendant's Exhibit 8A.)

Mr. Lewis: Will you pass them? [931]

Mr. Shelton: Your Honor, are these to be marked in evidence?

(Testimony of Roland Hellman.)

Mr. Lewis: Yes.

The Court: Yes.

Mr. Drewes: May I ask that they be so marked, subject to motion to strike in the event any part thereof prove not to be supported by evidence?

The Court: With that reservation.

Mr. Shelton: If your Honor please, I believe the Government's were not put in evidence and this is a difference in treatment between the Government's theory——

The Court: Both sides are entitled to have their summaries, if there be supporting testimony. If the Government has not already offered the summary, Mr. Shelton, they may do so.

Mr. Shelton: All right, your Honor. If your Honor please, are they in possession of the Court?

The Court: Are these summaries of yours, Mr. Lewis, identical with the ones we have been discussing?

Mr. Lewis: Yes.

The Court: All right, they may be marked.

The Clerk: United States Exhibit 51 in evidence.

(Whereupon the above-mentioned summaries were admitted in evidence and marked United States Exhibit 51.)

Mr. Lewis (Addressing the jury): These consist of three schedules—schedule 3, 3A and 4. Will you kindly [932] take one of each and pass them around to the members of the jury. (Handing documents to the jury.) Has everybody got the three schedules here?

(Testimony of Roland Hellman.)

I think, your Honor, it would be better to start with schedule four instead of schedule three and 3A, which is a summary. Schedule four is disposition of, deposits of cash in the deposit box.

Q. (By Mr. Lewis): Have you schedule four there? A. Yes, sir, I have, yes.

Q. Referring to the first item, "Cash in safety deposit box May 5 for account Milton Olender and Monroe Friedman."

Mr. Lewis: I think, your Honor, the testimony at page 411 of the transcript supports that.

Q. (By Mr. Lewis): What is that amount?

A. \$75,000.

Q. Take up the next item.

The Court: As to that item, there is a dispute between the Government and the defense counsel?

Mr. Lewis: That is right. That appears in the transcript in three different places. The witness testified five to \$10,000 he took out of the box before he went to Texas, and before——

The Court (Interposing): My purpose is: Although there maybe be some dispute, some disparity or conflict in the record, the Government's position is and the starting [933] position of the Government is \$50,000.

Mr. Lewis: That is right.

The Court: In their summary.

Mr. Lewis: That is right.

The Court: So right at the very threshold you have a disparity of \$25,000 between the Government's position and the defense's position.

(Testimony of Roland Hellman.)

The Witness: Your Honor—

The Court: Just a minute. I just wanted to get that explanatory note to the jury, to discuss the essential differences that we will be confronted with ultimately in the determination of this controversy.

Mr. Lewis: Your Honor, I don't know but what the proper procedure would be to give them the Government's Exhibit at this time and they can make their own comparison as we go along.

The Court: I think the Government is entitled to do it the way they wish. I am not going to try the case for them.

Mr. Shelton: Mr. Lewis started by referring to a page in the transcript.

The Court: That may be omitted.

Mr. Drewes: I think we are entitled to hear from the witness' own lips.

Q. (By Mr. Lewis): Take the second item "Cash brought [934] back from Texas \$7,500." What is the basis?

A. The basis for this is some testimony of Mr. Olender given on the stand here.

Q. Take up the third item under withdrawals: "June 16, transfer personal bank account." What is the basis for that entry?

A. Mr. Olender testified as to his source of funds and made the statement that any funds that were not shown as withdrawn from his business or having been received from the other sources of income—stocks, dividends, or interest—would have come from his safe deposit box. And that is one item

(Testimony of Roland Hellman.)

that was shown as deposited in the personal file as \$100 cash and in the absence of finding it comes from any other source of income, it was taken through this records as cash withdrawn from either the safe deposit box or cash box.

Q. And you found a cash deposit on that date— did you find a cash deposit on that date to his personal bank account?

The Court: Pardon me. It is very difficult to follow a sequence of figures. Can we get these Exhibits at a later time? Does it matter, Mr. Lewis?

Mr. Lewis: I thought if there was any question—

The Court: I suggest the jury retire over the noon recess and you correlate, collect and get together all these [935] Exhibits, because it is disconcerting to follow a number of figures.

Mr. Lewis: Yes.

The Court: No reflection on the clerk. At the same time, the rustling of papers is disconcerting, We will resume at two o'clock, ladies and gentlemen, with the same admonition not to discuss the case or to form or express any opinion until it is finally submitted to you. I have a couple of matters I wish to discuss with you.

(Thereupon, at the hour of 11:40 a.m., the jury retired from the courtroom.)

The Court: The accountant has indicated that perhaps my statement to the jury was not entirely accurate. I merely gave it as an indication that

(Testimony of Roland Hellman.)

might put them on the alert that these statements were not in accord in the essence, that there were wide differences, and this is the illustration.

Mr. Lewis: That is correct.

The Court: I think I was slightly incorrect, perhaps, because your starting point is May, 1944.

The Witness: That is right.

The Court: \$75,000. The Government started with a starting point—

Mr. Lewis: December.

The Court: December. [936]

The Witness: 31st.

The Court: To that extent I was incorrect as to date.

Mr. Lewis: You were correct as to the figure, your Honor, at the end of the year.

The Court: What is your anticipation as to the future of the case, as to witnesses and a possible closing of this suit, and so on?

(Discussion between Court and counsel off the record.)

The Court: Bear in mind this jury is not comprised of C.P.A.s. It represents the laity of the community. None of them have had a course at Hughes Business College. I have suggested to counsel in other cases and reiterate now, start with the premise they know nothing about accounting and try to bring them to your point of visualizing what you have in mind. The defense has its objective, the prosecution its objective. Net worth cases are

(Testimony of Roland Hellman.)

hard cases for juries, in my opinion. I may be wrong. I think I am correct.

Mr. Lewis: They are hard cases for lawyers to prepare, too, your Honor.

The Court: All right, is there anything else, gentlemen? That you have in mind?

Mr. Drewes: Not on the part of the Government.

The Court: Mr. Shelton?

Mr. Shelton: No, your Honor. [937]

The Court: We will resume at two o'clock.

(Whereupon this cause was adjourned until two o'clock p.m. the same day.) [937-A]

Wednesday, October 1st, 1952, 2:15 P. M.

ROLAND HELLMAN

resumed the stand, and having been previously duly sworn, testified further as follows:

Direct Examination (Resumed)

By Mr. Lewis:

Q. Mr. Hellman, I am showing you the defense Exhibit No. AD, defendant's Exhibit No. AF, defendant's Exhibit No. AG, defendant's Exhibit Z, defendant's Exhibit AB, and defendant's Exhibit AC, and defendant's Exhibit G.

That is just an aid, your Honor, in going through the statement of the disposition of cash in the safe deposit box, Schedule No. 4.

(Testimony of Roland Hellman.)

I think we were down to June 16th, the third item, "Transfer to personal bank account," under "withdrawals," \$100.

What is the basis for that item, Mr. Hellman?

A. The \$100 shown is a withdrawal from cash in safe deposit box as per Exhibit D.

Q. A little louder?

A. Exhibit D indicates a currency deposit in his personal account and his testimony given indicating that any cash other than from these sources—other than from the store or the other sources described would have come from the safe [938] deposit box.

Q. All right. Let's take the next item.

A. The next item is identical, the \$400, we have a deposit slip into the personal account on June 22 of \$400, and the same assumption as far as where the source originated.

Q. Will you speak just a little louder, Mr. Hellman? I have been criticized for not speaking loud enough myself.

Let's take the next item, the June 27th item.

A. June 27th of \$1500 was a deposit to the personal bank account that I verified through the bank on checking the deposit slips of Mr. Olender.

The bank failed to send it over here, but I can testify that I actually saw that original deposit ticket, and it is shown \$1500 cash thereon.

Q. Let us take the next item, July 5th.

A. Addition of \$2500 was from the testimony of Mr. Olender; we have Exhibit 24 which contains the schedule showing that amount also.

(Testimony of Roland Hellman.)

Q. Take the next item, July 17th.

A. \$1500. We have an Exhibit AF showing a deposit on July 17, 1944, \$1500 currency to the account of Olender and Elkus and Mr. Olender testified that the source of that was the safe deposit box.

Q. Take the next item, August 21st, "Transfer to personal bank account." [939]

A. August 24, \$300, is the same as the previous items, cash deposit. We have Exhibit AD, a deposit ticket August 24th, \$300 currency.

Q. Now take the December 15 item of the additions to cash?

A. \$1000 gift from mother. Mr. Olender testified to that gift. It is also contained in the schedule in the Exhibit 24.

Q. Take the next item of December 16, the purchase of United States Treasury bonds, the sum of \$8,000.

A. That was testified to by Mr. Olender and also as per the Exhibit 24.

Q. Take the next item, "Purchase of merchandise for store by cash from Barney," in the sum of \$2160.03. Where do you get that item from?

A. We have Exhibit Z here with these two checks to Barney's totalling that amount and also from testimony of Mr. Olender.

Q. Take the next item, the balance of cash on hand as of December 31st.

A. Balance of cash—

(Testimony of Roland Hellman.)

Q. 1944. How do you arrive at that figure of \$72,039.97?

A. Balance of cash on hand as of December 31st, 1944, is made up of the—it is the total of the original balance of 75,000 plus the additions just enumerated, less the withdrawals. The balance would be—would have been that figure of \$72,039.97. [940]

Q. Now let us proceed to 1945, January the 2nd, "Gift from mother" in the sum of \$3,000. Where do you get that item from?

A. That was from testimony of Mr. Olender and also contained in Exhibit 24.

Q. January the 2nd, 1945, "Cash received from Fresno partnership," \$1,807.46, as an addition to your column. Where do you get that item?

A. That item comes from testimony of Mr. Olender and making the mathematical computation on the tax return as to how much he reported income.

Q. Take the next item, May the 31, "Purchased cashier's checks, Bank of America," the number, deposited it in Army & Navy Store June 20, 1945, in the sum of \$3,000. How do you reach that figure?

A. That item was testified to by Mr. Olender and I also personally verified from the Bank of America that that cashier's check had been purchased.

Q. What about the next item that \$3500 as a withdrawal? How did you arrive at that figure?

A. That is the same explanation. I verified that through the bank and Mr. Olender testified to that amount.

(Testimony of Roland Hellman.)

Q. The next item is another cashier's check in the sum of \$3500 on June the 6th, 1945. How did you verify that figure? [941]

A. In the same manner, through the bank and from Mr. Olender's testimony.

Q. The next item is another cashier's check, deposited the Army & Navy Store account June 20, 1945, in the sum of \$5,000. How did you arrive at that figure?

A. That was verified in the same manner at the Bank of America; also from Mr. Olender's testimony.

Q. The next item June 9th, "Transfer to personal bank account," \$500. How do you arrive at that figure?

A. That is one of the items on the Exhibit AD, June 9, 1945, \$500, currency deposit, and also from Mr. Olender's testimony.

Q. Take the next item August 27th, "Transfer to personal bank account," \$522. How did you arrive at that figure for a withdrawal?

A. Exhibit AD contains a deposit ticket \$522 currency and also from testimony of Mr. Olender.

Q. Take the next item: "November—purchase of United States Treasury bonds \$5,000." How did you arrive at that figure?

A. That was the original testimony of Mr. Olender.

Q. Take the next three items, the transfer to savings account for James Harold Olender, \$5,000—

A. Exhibit—

(Testimony of Roland Hellman.)

Q. —Milton H. Olender, trustee, for Richard Raymond [942] Busby, \$5,000, Milton H. Olender, trustee for Audrey Elaine Olender, \$5,000. How did you arrive at that figure?

A. Exhibit AG includes three deposit tags to those specified names of \$5,000 each on November 20, 1945, and from testimony of Mr. Olender the sources of the cash in the safe deposit box.

Q. Take the next item December 31, balance of cash on hand, \$30,825.43. How do you arrive at that figure?

A. You missed the November 20th item.

Q. November 20th—yes—“Transfer to personal bank account,” \$10,000.

A. The explanation of that is the same. We have a deposit ticket dated December 31st.

Q. Dated November 20th, isn't it?

A. November 20th, excuse me. November 20, 1945, \$10,000, and it is also from testimony by Mr. Olender. The balance on December 31st of \$30,825.43 is computed in the same manner as explained above, starting with the \$72,039.97 balance as of December 31, 1944, adding the additions, subtracting the withdrawals, arrive at a balance of cash as of December 31st, 1945, at \$30,825.43.

Q. Let us proceed down to 1946, January, cash received from Fresno partnership, and addition the sum of \$1725.11. How do you arrive at that figure?

A. From testimony of Mr. Olender and by mathematical computation taken from the tax re-

(Testimony of Roland Hellman.)

turn of Mr. Olender showing [943] the income from the Fresno partnership.

Q. Now let's take the item May 1, 1946, "Transfer to personal bank account" \$6,000.

A. That is contained in Exhibit AD as a deposit, May 1st, 1946, currency deposit of \$6,000, and also from testimony of Mr. Olender.

Q. Take the next item of May 1, "Transfer to Olender-McGrete bank account," \$5,000. How do you arrive at that item of withdrawal?

A. We have Exhibit AB indicating a \$5,000 deposit on May 1st, 1946, and from testimony of Mr. Olender.

Q. Take the next item, May 2, 1946, "Transfer to Olender-Elkus bank account," \$1700. How do you arrive at that figure?

A. We have a deposit ticket dated May 2nd, 1946, indicating a deposit of \$1700 currency, and also from testimony of Mr. Olender.

Q. Take the next item July 10, 1946, "Transfer to personal bank account," \$570.36. How do you arrive at that figure?

A. We have a deposit ticket indicating that much cash deposit on July 10, 1946, in Mr. Olender's personal bank account, and testimony of Mr. Olender.

Q. Take the next figure, September the 18th, "Transfer to Olender-Elkus bank account"——

A. We have a deposit.

Q. ——\$1500. [944] A. \$2500.

Q. Or \$2500,—you are correct.

(Testimony of Roland Hellman.)

A. We have a deposit ticket dated September 18th, 1946, indicating a deposit of \$2500 currency, and the testimony of Mr. Olender that that came from the deposit box.

Q. Take the following item, September 23, 1946, "Transfer to personal bank account," \$1500. How do you arrive at that withdrawal?

A. We also have a deposit ticket for that September 23, 1946, \$1500 deposit, and from testimony of Mr. Olender.

Q. Take the next item, "September,—down payment on furniture, W. & J. Sloane \$1000."

A. That is based on testimony of Mr. Olender.

Q. Is it also based on the stipulation in this case? A. I believe so.

Q. Take the next item, November 25, 1946, "Transfer to personal bank account," \$6,000.

A. We have a deposit ticket here dated November 25, 1946, \$6,000 currency deposit, and also from testimony of Mr. Olender.

Q. Take the next item December the 4th, 1946, "Transfer to personal bank account," \$2800.

A. We have a deposit ticket dated December 4, 1946, \$2800 currency and from testimony of Mr. Olender.

Q. Take the item December the 20th, "Transfer personal [945] bank account," \$1500.

A. We have a deposit ticket dated December 20, 1946, indicating currency deposit of \$1500 and also from testimony of Mr. Olender.

Q. Take the next item, "Non-deductible expendi-

(Testimony of Roland Hellman.)

tures included in stipulation," \$1340.40. Why do you list that as a withdrawal?

A. Those were cash expenditures which are in the total as per stipulation.

Mr. Shelton: If the Court please, I will move to strike that answer on the ground that the record in this case shows that there are checks which have not been accounted for which could have supplied money for use in paying those non-deductible expenditures; that there is an insufficient foundation laid on the non-deductible expenditures.

The theory of the defense is, as I understand it, that this money must have come out of the box.

Is that your theory?

Mr. Lewis: That is what Mr. Olender testified, if there was not a check in withdrawal from one of the different accounts.

The Court: Overruled.

Q. (By Mr. Lewis): Take the next item, non-deductible expenditures admitted in evidence, I. Magnin & Company, \$863.73, "Gray Shop, \$1391.01, total \$2254.74." [946]

What is the basis for that withdrawal?

A. Those are covered by stipulation as coming from cash, and if they were, as testified, possibly paid by the daughter, then they should not have been added on the Government net worth statement.

Mr. Shelton: If your Honor please, that is a conclusion. The defense effort here is to account for cash. Now, Mr. Olender testified on this stand

(Testimony of Roland Hellman.)

this morning as to his lack of knowledge of those two accounts, and if the defense is to start with a specific—

The Court: I will sustain the objection. It is inference upon inference on that.

Mr. Lewis: Then, your Honor, I might point out that we are accounting for withdrawals and it just reduces our increases of cash on hand. Actually, this is part of the Government's normal proof.

The Court: Well, as I view it, I ruled on it as I saw it, apart from arithmetic aspects.

Mr. Lewis: Yes. Well, that is all right with us.

The Court: If it is to your benefit you should invite the objection.

Mr. Lewis: I do, your Honor.

Q. (By Mr. Lewis): Then, Mr. Hellman, remove from your calculations the \$2,254.74 named in non-deductible expenditures admitted in evidence to I. Magnin and Gray Shop, and with that [947] removal what would be the balance of cash on hand as of December 31st, 1946? A. \$2,639.76.

Q. I will now refer you, Mr. Hellman, to Schedule 3, Milton H. Olender, net worth. Will you tell us how you reached the net worth before—reached the figure net worth per Government computation before the adjustment started?

A. Those figures were merely taken, copied identical from the statement presented by the Government in court here.

Q. And what is the figure of the net worth per

(Testimony of Roland Hellman.)

the Government computation for the year ending December 31, 1944? A. \$191,002.07.

Q. And for the year 1945? A. \$260,113.29.

Q. And for the year 1946? A. \$283,193.62.

Q. Now let's proceed to the adjustments listed under additions to net worth. Cash in safe deposit box, No. 56, Bank of America, main office, Oakland, balance per Schedule 4. Did you reach that by making—transferring the disposition of cash as shown by the Schedule 4 that we just went through with the figure that you show there?

A. Same figure, \$72,039.07.

Q. The Government figure was from the computation sheet that they gave us in this case, was it not? [948] A. That is correct.

Q. And what did their figures show?

A. \$50,000. That is also indicated above as part of the net worth by the Government.

Q. And for the year 1944, what does your computation show as a difference between your computation and the Government figure?

A. An increase in the cash in safe deposit box for the period at December 31, 1944, of \$22,039.97.

Q. And what is the figure that you reached through your computation from Schedule 4 for the year 1945?

A. The balance of cash per Schedule 4, December 31, 1945, is \$30,825.43.

Q. And what is the Government figure as the basis for their computations? A. \$7,200.

Q. What is the net increase in your figures over

(Testimony of Roland Hellman.)

the Government figures? A. \$23,625.43.

Q. Now, taking the year 1946 and excluding the non-deductible expenditures to I. Magnin and Gray Shop in the sum of \$2,254.74, what would be the cash on hand according to your net worth figures?

A. \$2,639.76.

Q. And what did the Government show on their computations? [949] A. Zero cash.

Q. I think you have there before you the defendant's Exhibit G? A. Yes.

Q. Will you take that check and explain to the Jury and to his Honor what effect that has on the opening net worth for the year ending December 31, 1944?

A. Exhibit G is a check drawn to M. Olender on the Army-Navy Store as a withdrawal indicated on the books as a withdrawal dated December 23, 1944, in the amount of \$1,000, deposited in Mr. Olender's account on January 10th, 1945, indicating this money had been taken—withdrawn from the store and was on hand as of December 31, 1944.

Q. And that is the basis for your addition of \$1,000? A. That is correct.

Q. The second addition on the schedule?

A. That is correct.

Q. Now take the next item, amount paid for Goodman sailor suits awaiting disposition not taken into account in store inventory on books per Schedule 1, \$2,550.00. What is the basis of your making that addition to the defendant's opening net worth as of December 31, 1944?

(Testimony of Roland Hellman.)

A. That is based upon evidence of—testimony of Mr. Olender, and also part of the testimony taken from Mr. Saraga's books.

Q. Was it based on Mr. Leavy's [950] testimony?

A. Mr. Leavy's testimony and also on the cashier's checks that were made payable to Goodman for \$20,550.

Q. And as an accounting practice in the light of the testimony here before the Court, do you think that it is proper to include that \$20,550 as an addition to the net worth of the defendant as of December 31, 1944?

Mr. Shelton: Objected to, if your Honor please. I believe the form of the question should be based on Mr. Olender's testimony rather than the testimony before the Court because as I understand it, this witness is stating the defense theory. That is an issue on which there is a conflict in evidence.

The Court: Just revise the question.

Mr. Lewis: Yes, your Honor.

Q. Then do you think, as a matter of accounting practice on the basis of Mr. Olender's explanation of the \$20,550 and the cashier's checks that were purchased according to the testimony in the record in January, 1944, that the \$20,550 should be added to the net worth of this defendant as of December 31, 1944?

A. Based upon the testimony mentioned of Mr. Olender, and also from other testimony, the figure of \$20,550 in the form of merchandise or proceeds,

(Testimony of Roland Hellman.)

I believe the testimony is that it is merchandise, at the end of 1944 that was not already considered as part of his inventory in the store would be an [951] additional asset acquired from cash in January, 1944, which is a period before the date in which—of May 4th when the Schedule 4 commences. Therefore, that would be an additional asset and added to his net worth at December 31st, 1944.

Q. Let us take the next item, the over-statement of accounts payable, \$6,903.02. What is the basis of your assumption that that should be added to the December 31st, 1944, net worth of the defendant?

A. As previously testified to, that item is made up of the Smith transactions and the Barney transactions which were put—which the bookkeeper put on the books and showed them as an accounts payable when in fact Mr. Olender had paid for the merchandise earlier in the year. If he had used cash the accounts payable—the invoices were not owing as of December 31, 1944, and the accounts payable over-stated on the books from which the business investment, net investment in the Army-Navy Store was computed. If the liability is over-stated it would increase the net worth.

Q. Now, referring back to Schedule 4, November and December purchase of merchandise for store by cash, Barney, \$2,160.03—

A. \$2,160.03?

Q. That is right. Now, are these two items inter-related? A. Yes, they are.

(Testimony of Roland Hellman.)

Q. Will you explain to his Honor and the Jury that relationship and why you have treated it on this Schedule 3 and 4 [952] as you did?

A. As previously testified to, the Barney transaction in December—November and December, 1944, totalling \$2,160.03 were paid for with cashier's checks dated November 9th, 1944, and December 12th, 1944, and as has been testified to the funds came from the safe deposit box which they were paid—and they were paid in 1944. Yet, the books reflect that they were owing as of December 31, 1944. An adjustment was made in February, 1945, correcting that error.

Q. Let us proceed now on Schedule 3, to the next item, the proceeds of the Saraga check dated November 15th, 1945, in possession of Leavy per Schedules 1 and 2, \$7,725.00. Do you mean by Schedules 1 and 2 the schedules on the chart that we previously had before the Jury and the Court?

A. That is correct.

Q. Explaining the Leavy - Saraga - Goodman transaction? A. Yes, that is correct.

Q. Now, why do you include that as an addition to the net worth of the taxpayer for the year ending December 31, 1945?

A. That is included because the amount, \$7,725.00, was, it has been testified to, in possession of Leavy although it belonged to Mr. Olender, and it wasn't an asset at that time, December 31, 1945. The effect in reality, it is part—let's put it this way. Of the item of \$20,550.00 shown at December

(Testimony of Roland Hellman.)

31, 1944, this balance of \$7,725 is what is left [953] of that amount at that point.

Mr. Shelton: Objected to, your Honor. He makes that as a flat statement, not as a construction of any evidence.

The Court: Sustained.

Mr. Shelton: May that go out?

The Court: Yes, it may go out.

Q. (By Mr. Lewis): On what evidence do you base your assumption that the \$7,725.00, the proceeds of the Saraga check dated November 15, 1945, proceeded from the \$20,550.00 and is an addition to the net worth of defendant as of December 31, 1945? Whose evidence?

A. There is testimony that—

Q. Who by?

A. By Mr. Leavy and Mr. Olender.

Mr. Shelton: If your Honor please, I move to strike the reference to Mr. Leavy because I do not believe—I believe the record will show that his testimony did not tie in these particular suits to the ones originally covered by the \$20,550 of cashier's checks.

Mr. Lewis: I think it did, your Honor.

Mr. Hagerty: Most certainly, your Honor.

Mr. Lewis: We have had all of the testimony going through Schedules 1 and 2 twice for the Court, and I think it certainly ties in. I wouldn't want to have to put on that testimony for another afternoon. [954]

(Testimony of Roland Hellman.)

The Court: I think it probably will support those.

Q. (By Mr. Lewis): You may answer the question.

A. Likewise—did you want me to expand further on the relation of that 20,—

Q. Yes.

A. In accordance with the testimony given the \$7,725.00 shown as being on hand at December 31, 1945, is the balance of the \$20,550.00 item shown in 1944 which has the effect of—under the net worth method of computing income, of increasing the net worth at the end of 1944, by the amount of \$20,550 less the \$7725 which is taken in at the end of 1945.

Q. Now let us take up the next item, the total additions to the net worth of the defendant by your computations on December 31, 1944, is how much?

A. Total additions at December 31, 1944, are \$50,492.99.

Q. Will you briefly point out again to the Court and Jury the points which comprise that \$50,492.99?

A. That is the total of the four immediate items above that, the increase of cash of \$22,039.97, the \$1,000 check on hand, the \$20,550 in the Goodman transaction and the \$6,903.02 overstatement of accounts payable making a total of \$50,492.99.

Q. Now, what is the increase in net worth as of December 31, 1945 which results in toto out of the Saraga check over [955] the Government's computation?

A. Saraga check of \$7,725.00 plus the increase

(Testimony of Roland Hellman.)

in cash in safe deposit box of \$23,625.43 makes a total addition of \$31,350.43 at December 31, 1945.

Q. Now, what is the addition to the defendant's net worth over the Government's computation for the year ending December 31, 1946, excluding the non-deductible expenditure item of \$2,254.74?

A. The addition, total addition would be \$2,639.76 which consists entirely of the adjustment to cash in the safe deposit box as of December 31, 1946.

Q. Now let's proceed to the next item, reductions. By that you mean the reductions from net worth as shown by the Government in their computation, do you not? A. That is correct.

Q. And also the reduction as shown by our computation up to this point which is the net worth of the Government at the end of each year and the additions that we have made to that net worth, is that correct? A. Yes.

Q. All right, is there any changes other than those mentioned before constituting the \$50,492.99 as additions to the net worth of the defendant as of December 31, 1944?

A. No, not to my knowledge.

Q. According to your computation what is the net—what [956] was the net worth of the defendant as of December 31, 1944?

A. Based upon the figures here and the addition of \$50,492.99 to the Government's figure of \$191,002.07 makes a total net worth as of December 31, 1944, of \$241,495.06.

(Testimony of Roland Hellman.)

Q. Under the heading of "Reduction,"—"United States Treasury bonds of mother, Mollie Olender, included in the Government computation," what did you do with that item and upon what basis?

A. That item was shown as a reduction to the net worth as per the Government figures, based upon testimony of Mr. Olender as to those bonds belonging to his mother. Therefore, it would be a reduction of the net worth. The reduction of \$20,000 is subtracted from the addition of \$31,350.43, making a net addition for the year of \$11,350.43, which, when added to the Government figure of \$260,113.29, makes a net worth as of December 31, 1945, of \$271,463.72. The same——

Q. Now——

A. It has the same effect at the end of December 31, 1946.

Q. Upon what basis do you say that it has the same effect on the Government's computation of net worth as of December 31, 1946?

A. Inasmuch as this amount of \$20,000 is also included in the figure—in the Government computation of treasury bonds shown above totalling \$57,000 there, \$20,000 of those [957] representing treasury bonds of Mollie Olender would be subtracted from the net worth as of December 31st, 1946.

Mr. Shelton: Your Honor, it is understood that this is still based on his earlier testimony basis.

Q. (By Mr. Lewis): Assuming that that \$20,000 worth of bonds belonged to his mother, as was

(Testimony of Roland Hellman.)

testified to heretofore on the trial by Mr. Olender, what is your figure of the net worth of the defendant as of December 31, 1946?

A. By adding the cash of 263976, subtracting the \$20,000, makes a net reduction in net worth of \$17,360.24, which, when subtracted from the Government figure of \$283,193.62, makes a net worth of \$265,833.38.

The Court: We might take the afternoon recess.

Mr. Lewis: All right.

The Court: Same admonition, ladies and gentlemen.

(Thereupon an adjournment was taken until Thursday, October 2nd, 1952, at ten o'clock a.m.) [958]

October 2nd, 1952, 10:00 A.M.

The Clerk: United States of America vs. Olender on trial.

Mr. Shelton: If your Honor please, we would like to ascertain from the defense if they expect this to be the last witness. We have some witnesses.

Mr. Lewis: Yes, your Honor, this will be our last witness.

Mr. Shelton: One other thing, if your Honor please. Yesterday there was a discussion of this item on Schedule 4 with respect to the I. Magnin and Gray Shop.

The Court: Yes.

Mr. Shelton: In the amount of \$2254.74. Mr.

Lewis has handed us this morning a corrected schedule to correct Mr. Hellman's computation to adjust his 1946 computed income by increasing it by that amount, the \$2254.74, and yesterday Mr. Lewis stated in the argument that this adjustment was to the defendant's advantage, and I think the record should show it is to the Government's advantage.

Mr. Lewis: Your Honor, all I——

The Court: He merely added it from his viewpoint; in terms of addition, he regarded it as to his advantage.

Mr. Lewis: Your Honor, I think I was a little in error on that and I think the item should remain as it is. [959] I will introduce evidence at this point. But I call your attention to the transcript, page 202, where Mr. Whiteside stated:

“We received the checks for 1946 and there were certain checks for 1945 which were brought out and they were not all produced.

“Q. In other words you got all the 1946 checks and some of the 1945 checks?

“A. And some of the '45.”

ROLAND HELLMAN

resumed the stand, and having been previously duly sworn, testified further as follows:

Direct Examination (Resumed)

By Mr. Lewis:

Q. Now I am going to show this witness, U. S. Exhibit No. 19, U. S. Exhibit No. 29, and defendant's Exhibit No. AC. (Handing to witness.)

(Testimony of Roland Hellman.)

Have you had an opportunity before the Court to examine those exhibits?

A. Yes, sir.

Q. Will you state to the Court what those exhibits are?

A. Yes, sir.

U. S. Exhibit 19 consists of statements from I. G. Magnin & Company with the letter attached, November 4, 1948, in which are listed the purchases and the payments, credits, [960] to the account running—it covers a period from April, of '46, to October, '48.

U. S. Exhibit 29, although it is not actually—nothing on here saying Gray Shop—it was introduced as an exhibit from the Gray Shop.

Q. Talk a little louder, Mr. Hellman.

A. The ledger account of Mr. M. H. and Betty Olender from the Gray Shop from the period July 2, 1946, until March 7, 1947.

Defendant's Exhibit AC are the ledger accounts of the Bank of America of a personal commercial checking account of Milton H. Olender from the period December 31, 1943, to January 29, 1947.

Q. Are there any withdrawals from that bank account that compare with any of these payments made on either one of those accounts?

A. No, sir, there are not.

Mr. Lewis: Your Honor, I think it is self-evident that if they were paid at all, they were paid in cash, because he did not withdraw it from his bank account, and I think that the non-deductible expenditures admitted in evidence, that \$2554.74,

(Testimony of Roland Hellman.)

should remain on Schedule 4 as it was originally placed there.

Mr. Shelton: If your Honor please, the Government thinks there are at least two reasons why that position is [961] not sound. In the first place, there is a very real difference between payment by cash and payment by check coming out of a safe deposit box. The purported purpose, and I think the admitted purpose of this schedule here, schedule 4, is not to show what was paid in cash but what came out of the defendant's safe deposit box and was used in cash. So that there is an entire difference.

And one thing which could of course have happened, and probably did happen, is that checks were during that time drawn to cash or drawn to cash in an earlier period, which could have been used to make this payment, these payments that did not come out of the box.

The second point is that there are other items of unaccounted for cash receipts of the defendant, such as bond interest and dividends which are not accounted for on this schedule.

And he further testified, Mr. Olender testified yesterday, that he did not pay either one of these bills.

The defense has therefore not established the circumstances, and if they contend that these items came out of the box, the burden is on them to show that the money came from the box.

For that reason we submit your Honor's ruling yesterday was sound.

(Testimony of Roland Hellman.)

The Court: I am inclined to agree with you, Mr. Shelton, [962] on that point. I think it incumbent upon the defense to establish the source, and the inferences may be drawn one way or the other, and they are fairly well drawn one way or the other.

Under the circumstances I think my ruling is correct.

Mr. Lewis: Your Honor, I think that as a matter of fact they should not come in at all because no one stated that the defendant pay them in the first place. It does not appear in the record at any place that the defendant ever paid these bills. The witnesses testified they didn't know who paid them, or whether they were paid by cash or check.

The Court: Well, let us pass that point.

Mr. Lewis: All right.

Then, your Honor, I just handed the clerk a Schedule 3A, which is really the amendment, that will be necessary to get the computations as a result of your Honor's decision, which I would now like to pass to the jury.

The Court: You may. This is amended Schedule 3-A.

(Amended Schedule 3-A passed to the Jury.)

Mr. Lewis: I believe the Jury all have their copies now, and we will proceed, Mr. Hellman, to the net worth according to your computations of the defendant as of December 31, 1945.

A. On Schedule 3-A?

Q. Yes. [963]

(Testimony of Roland Hellman.)

A. Did we mention the changes on Schedule 3 at the end of 1946 to tie in with the new Schedule 3-A?

Q. We took those up in the evidence yesterday, according to the transcript, your Honor.

Your Honor, at the completion of the one in evidence, can we make that change on the face to conform to the record?

The Court: You may.

Q. (By Mr. Lewis): What is your figure for the net worth of the defendant as of December 31, 1945? A. \$271,463.72.

Q. What was the net worth according to your computations at January 1st, 1945?

A. \$241,495.06.

Q. What is the increase in net worth for the year 1945? A. \$29,968.66.

Q. You now add the figure "Non-deductible expenditures" in the sum of \$19,081.32. That is the figure given in the stipulation between counsel in this case, isn't it? A. That's correct.

Q. What was the total income of the defendant for the year 1945?

A. Total income on a net worth basis was \$49,049.98.

Q. Now you deduct "Non-taxable portion of net gain from sales of assets," \$139.77, and that is per the stipulation, is it? [964]

A. That's correct, that is the excess of the capital gain over the amount required to be reported.

Q. Now you also deduct "Non-taxable gifts re-

(Testimony of Roland Hellman.)

ceived: January 2, 1945, Mollie Olender, Mother, \$3,000.”

Why do you deduct that item?

A. That was proceeds received at that date going into the safe deposit box, which does not constitute taxable income, and on a net worth method the gifts are received in the value of the net worth. Therefore the gifts must come out in computing the corrected taxable income on a net worth method.

Q. And on August 24, 1945, you deduct the sum of \$575 as a non-taxable gift from Mrs. Widrin. Why do you do that?

A. That is for the same reason, inasmuch as it is not income, although it is an increase in net worth.

Q. And also the same date, Mrs. Foote, \$2,500. Is that for the same reason? A. Yes, sir.

Q. Now what is the net taxable income, according to your computations, for the year 1945 of the defendant?

A. Net taxable income based on net worth method is—this is as of December 31, 1945—\$42,835.21.

Q. What did the defendant report—

A. The combined— [965]

Q. —as the net taxable income on his return?

A. The combined taxable income reported per the return of Milton Olender and Betty Olender was \$41,067.61.

Q. And what is the difference between the net taxable income under your net worth computations

(Testimony of Roland Hellman.)

and the net taxable income per the returns?

A. The income computed under the net worth method is \$1767.60 more than was reported on the return.

Q. Now let's go through the items for '46.

Your Honor, I will put these figures on the board when we get through with this witness.

What was the net worth of the defendant as of December 31, 1946? A. \$265,833.38.

Q. What was the net worth as of January 1st?

A. \$271,463.72.

Q. What is the decrease in the net worth of the defendant for the year 1946?

A. The decrease in net worth is \$5630.34.

Q. And then you add the non-deductible expenditures as shown by the stipulation in the sum of \$23,985.63? A. That is correct.

Q. And you also add the I. Magnin account not covered by the stipulation as a non-deductible expenditure in the sum of \$863.73? [966]

A. Yes, sir.

Q. And you add the Gray Shop, non-deductible expenditures, in the sum of \$1391.01?

A. That's correct.

Q. Now what is the total income of the defendant for the year 1946?

A. Total income computed on the net worth method for 1946 is \$20,610.03.

Q. Do you deduct from that the non-deductible portion of the net gains from sale of assets in the stipulation of \$464.47?

(Testimony of Roland Hellman.)

A. That's correct. That's the excess of the capital gain over the amount required to be reported by law.

Mr. Lewis: Your Honor, I think it might be advisable for him to explain why they deduct from income when they have a long term capital gain, to the jury.

Q. Why do you make that deduction?

A. As an example, if you sold an asset, a home or any other asset, and had—you realized a thousand dollars profit on it. If the asset had been held over a six month period, the Internal Revenue Law provides that only 50 per cent of the profit is taxable. However, if you received the thousand dollar profit, that would increase your net worth by a thousand dollars, but the tax would only be required to be paid on \$500. Therefore you must reduce the over-all increase in net worth by the amount of income that is not required [967] under the law to be taxed.

Q. What was the net taxable income of the defendant for the year 1946?

A. The net taxable income under the net worth method for the year 1946 was \$20,145.56.

Q. And what was the net taxable income as shown on the defendant's returns?

A. The combined net taxable income reported by Milton Olender and Betty Olender for the year 1946 was \$23,514.62.

Q. What was the net effect of that?

A. The net effect was under the net worth

(Testimony of Roland Hellman.)

method as compared to the regular method of filing on the tax return, the income for 1946 is overstated by \$3,369.06.

Q. What was the total tax liability of the defendant for the year 1945 under your net worth computation?

A. Total tax liability under the net worth method for 1945 \$16,510.83.

Q. What was the reported tax of the defendant on his returns? A. \$15,495.75.

Q. What was the underpayment of tax for the year 1945 under your net worth computation?

A. The underpayment was \$1015.08.

Q. What was the tax liability of the defendant under you net worth method for the year 1946?

A. \$4417.02. [968]

Q. What was the amount of tax he actually paid? A. \$5562.79.

Q. What is the difference, what does that result in?

A. It results in an overpayment of tax in the net worth method of \$1145.77.

Q. Now, Mr. Hellman, you have been proven to be an expert in this field. Can you state that the net worth that you prepared is entirely accurate?

Mr. Shelton: Objected to, if your Honor please. It is clear that this is based on evidence that this man did not have first hand. It relates to the evidence in the transcript, the documentary evidence in the case. He has testified as to how he did it

(Testimony of Roland Hellman.)

and what he did with it, and I submit they can't testify positively that it's right.

The Court: From his viewpoint, based upon the record, he may state that it is accurate from an accounting viewpoint and tax-wise.

Is that your statement?

A. No, sir. It is not correct.

The Court: It is not correct?

A. No. No net worth statement is ever correct.

Q. (By Mr. Lewis): What is the distinction between, why you have gone through the record, the transcript, the exhibits in this case——

A. Well, you can tell by Schedule 4, in an attempt to [969] reconstruct an item such as the disposition of cash in the safe deposit box after five or six years have elapsed, and you attempt to go back and reconstruct through evidence, some documentary and some verbal, and attempt to tie in what a man did five or six or seven years ago and to say that his cash position was exactly such, such as this little dispute on the Magnin and the Gray bills, whether that money came from cash in the box or cash on hand, or where it might have come from, there's numerous items like that that arise——

Mr. Shelton: Just a minute. Your Honor, I would object to this recital, on this ground, the net worth method does not ordinarily attempt to reconstruct cash in this very detailed method that this witness has used. The net worth method is ordinarily based on evidence of specific items at specific times.

(Testimony of Roland Hellman.)

Now, the Government does have such evidence in its \$50,000 cash figure, and for this witness in explaining the net worth method to bring in his very unusual adaptation of it——

Mr. Hagerty: If your Honor please,——

Mr. Shelton: Mr. Hagerty, please—I submit it is improper——

Mr. Hagerty: This is an argument before the Jury.

The Court: I think it is argument. The defense has offered in evidence, placed before this Jury, a reconstruction [970] of the cash position. Part of that cash position finds its way or had its emanation in the safety deposit box. This witness has stated the nature of things, that is not an accurate estimate, and it couldn't be. We will accept that statement. We will accept that statement. But that has nothing to do with the net worth theory.

Mr. Shelton: I may——

The Court: As I will instruct the Jury hereafter.

Mr. Lewis: That's right. The reason why I was pursuing this line of questioning was to inform the jury as to the nature of a net worth statement, that naturally we have to go with what documentary evidence we have and the statements of the witness in this case and try to reconstruct a picture where the books were not kept on that revolving fund, and so it is circumstantial——

The Court: You will have an opportunity, Mr.

(Testimony of Roland Hellman.)

Lewis, hereafter to argue the matter at length from your position.

Now the Government contends from their viewpoint that the figures they start with, the cash position of \$50,000, from their position the net worth theory is fairly accurate.

Isn't that your position?

Mr. Shelton: Yes, your Honor. We contend that the answer was not responsive to the question. That a general question about the net worth method does not bring in the type of thing done here by the defense. [971]

The Court: I will instruct the Jury on it.

Mr. Lewis: Your Honor, when I stated we would not have any witnesses, the only witness that we would have would be on these bank exhibits, as to these funds, because I believe they are in error. But the prosecution have put on their witnesses so that won't delay the matter.

Q. I am showing you Government's Exhibit No. 30, No. 31, and defendant's Exhibits AD and AG.

Will you look over the Government's Exhibit?

A. U. S. Exhibit—

Q. —and explain to us how those exhibits were handled by you?

A. U. S. Exhibit 30 is Treasury Department TCR, report of currency transaction that came up yesterday, and U. S. 31 is also currency transaction.

No. 31, under the transaction reported of November 9, 1945, shows amount involved \$25,000, and the bank denotes on its report to the Treasury Depart-

(Testimony of Roland Hellman.)

ment that there were purchased 250 \$100 bills.

And that was handled on the same date, November 9th, 1945—the books of Mr. Olender, his store books, the Army & Navy Store, indicate a withdrawal, and the check indicated being cashed for \$25,000, dated November 9, 1945.

Mr. Shelton: If your Honor please, may the witness state whether the withdrawals shown on the store books—[972] whether that withdrawal is in the same amount, for clarity?

A. Yes. \$25,000. If you will hand me the store book there, I will point it out, Mr. Lewis.

(Counsel hands Exhibit K to the witness.)

A. On the cash paid out journal, Exhibit K, page 58, under date of November 9, a charge to M. Olender, investment account, reducing his investment—charges a drawing, the same effect—and reducing the cash in bank by \$25,000.

The next item appearing on this TCR, Exhibit 31, of November 20, 1945, another \$25,000 item stating—there are also 250 \$100 bills.

Now the explanation given by the bank to the Treasury Department is, “On November 9 cashed a check of \$25,000,” which we just described. Then it states, “On November 20, 1945, deposited \$25,000 to commercial account.”

Now we have evidence here to indicate that “to commercial account” is not entirely correct. The deposit ticket of November 20th, 1945, does indicate a \$10,000 deposit to the personal—commercial account of Milton Olender of November 20, 1945. But the other \$15,000 is evidenced by three deposits of November 20, 1945, of \$5,000 each to the three

(Testimony of Roland Hellman.)

trustee accounts, which we enumerated yesterday, trustee for Audrey Elaine Olender, \$5,000; trustee for Richard Raymond Busby, \$5,000; and trustee for James Harold Olender, \$5,000—those three items of \$5,000 making a total of \$15,000, plus [973] the \$10,000 to his own commercial account, make the \$25,000 deposit of November 20, 1945.

Mr. Shelton: If your Honor please, I would like to inquire whether that deposit slip for \$10,000 is in evidence? A. Yes, it is.

Mr. Shelton: What is the exhibit number, Mr. Hellman? A. Exhibit AD.

U. S. Exhibit 30 is another TCR dated December 5, 1945, showing transactions of \$10,000 and \$15,000 on December 5, 1945. The explanation: "Issued cashier's checks for amounts. Paid with entire cash. Purpose: To buy bonds."

Now, the \$10,000 and \$15,000 items stem the \$25,000 cash—stems from the—or showing in the schedule—on this 250—I think I made a misstatement just earlier here. This 250 \$100 bills for which he cashed the store check on November 9, relates to this item of December 5 of the cashier's checks of \$25,000 and the November 20 item of \$25,000 is shown in our Schedule 4 as coming from cash withdrawals from the safe deposit box. On Exhibit 4, under date of November 20, 1945, we indicate the three \$5,000 transfers to the trust accounts, plus the \$25,000 transfer to the personal account. So the November 20 transaction of \$25,000 came out of the safe box, and the November 9 transaction, he bought 250 \$100 bills, and then this other

(Testimony of Roland Hellman.)

one in December 5, which also makes a reference to the November, \$25,000, [974] where they issued the cashier's checks, and then he turned around and used those cashier's checks to purchase bonds with in December, '45—December 5, 1945.

Mr. Shelton: Your Honor, I will move to strike that last answer and say that it is the conclusion of the witness that that same money was involved in those two transactions.

A. I beg your pardon, Mr. Shelton. If you will look at the TCR you will see the bank makes a reference to that. Here they make the reference to the 250 \$100 bills. They say in December, "Issued cashier's checks for amounts. Paid with entire cash. Purpose to buy bonds," and they refer to the same \$25,000 in November that is over here.

Mr. Shelton: So that that actually appears on the TCR, Mr. Hellman? A. That's correct.

Q. (By Mr. Lewis): Will you give me that TCR?

The court: The motion to strike is denied.

Q. (By Mr. Lewis): Will you give me that TCR? I would like to pass these Government exhibits to the Jury, your Honor.

Will you point out to one of the jurors, Mr. Hellman, where it makes that notation on the TCR, so when they look at it later they will not be confused?

(Exhibits passed to the jury.)

Mr. Lewis: While they are doing that, Mr. Hellman, will you put the figures on the board from your testimony? [975]

(Testimony of Roland Hellman.)

(Witness transfers figures to the black-board.)

Mr. Lewis: At this time, your Honor, I would like to have admitted into evidence Schedule 3-A, and also Schedules 1 and 2 of the Goodman transaction on which the witness has also testified to.

The Court: That may be marked.

The Clerk: Schedule 3-A in evidence as part of defendant's Exhibit AK.

(Thereupon Schedule 3-A was received in evidence and marked as part of Defendant's Exhibit AK.)

(Schedules 1 and 2 were received in evidence and marked Defendant's Exhibit AL.)

Q. (By Mr. Lewis): Will you point out to the Jury with the pointer there, Mr. Hellman, just what are the differences between your computations and the Government's?

A. Under our method of computing the net worth of the total net income for 1945 is \$42,825.21.

The Government says it is \$88,052.77.

The reported net income per tax return is the same as the Government Exhibit \$41,067.61.

The same figure \$41,067.61.

The difference our figures indicates in 1945 under net worth method, income was understated by \$1767.60.

The Government says \$46,985.16.

(Testimony of Roland Hellman.)

The total tax under the net worth method for 1945, [976] \$16,510.83.

The Government says it is \$46,582.24.

Per tax return taxpayer reported \$15,495.75, which is the same as the Government figure.

The difference in 1945 under the net worth method results in underpayment of tax of \$1015.08.

The Government says the tax is underpaid by \$31,086.49.

For the year 1946 the net income under the net worth method as computed, \$20,145.56.

The Government says \$48,856.23.

Reported net per tax return, \$23,514.62, which is the same as the Government figures.

The difference resulting in 1946, the income reported per the tax return under the net worth method is income overstated of \$3,369.06.

The Government says the income was understated by \$25,341.61.

The tax under the net worth method is \$4417.02.

The Government says it is \$17,494.82.

Reported tax per tax return is \$5562.79, which is the same as the Government figure, and the difference is, 1946, under the net worth method, for Mr. and Mrs. Olender, overpaid tax by \$1145.77, whereas the Government says they owe \$11,932.03.

Mr. Lewis: No further questions. [977]

Mr. Drewes: If your Honor please, the Government has under subpoena two witnesses, the bank employees from Fresno, who are now in the witness room. One of them unfortunately has been

taken ill. He has the flu, as of this morning, and he would like to testify and be discharged, if there is no objection.

Mr. Lewis: No objection.

The Court: Withdraw this witness then.

(Witness excused.)

R. L. McNAB

called on behalf of the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the Jury.

A. R. L. McNab, 3312 Brown, Fresno, I am with the Bank of America in Fresno.

Q. Your occupation again?

A. Pro-assistant cashier, Bank of America, Fresno, California.

Direct Examination

By Mr. Drewes:

Q. As you stated, Mr. McNab, you are employed by the Bank of America in Fresno?

A. Yes, sir.

Q. And as such you have access to the records of that branch bank? [978]

A. Yes, sir.

Q. In response to a subpoena which has been served upon you, Mr. McNab, have you brought with you from the Bank of America savings account records for account No. 3942, in the names of Mrs. J. or Mollie Olender, for the years 1942 to 1945?

A. Yes, sir.

(Testimony of R. L. McNab.)

Q. Have you also brought with you the bank records pertaining to account 2146 in the name of Mrs. J. Olender for the year 1942?

A. Yes, sir.

Q. Have you also with you savings account No. 126 in the name of Terrys Olender Gambor for the years 1942 through 1946.

A. Yes, sir.

Q. Have you further with you all the ledger sheets and deposit tags for the commercial account of Mrs. Mollie Olender for the years 1943 through 1946?

A. Yes, sir.

Q. May I see them, please?

A. (Witness producing.)

Q. Are these in any particular order?

A. Yes, sir, they are from the 1st on through.

(Handing to counsel.)

Mr. Drewes: Will you keep these in order, Mr. Lewis? [979]

Mr. Lewis: I will try to.

Mr. Hagerty: Your Honor, may this be a good time to take the recess while we examine these records?

The Court: We will take the morning recess, ladies and gentlemen. The same admonition.

(Short recess taken.)

Q. (By Mr. Drewes): Do you have the records which you have identified, Mr. McNab?

A. Yes, sir.

(Testimony of R. L. McNab.)

Q. Were those records kept by the bank in the regular course of business? A. Yes, sir.

Q. And do you have with you photostatic copies of those records? A. Yes, I do.

Mr. Drewes: It is stipulated that photostatic copies may be substituted for the originals?

Mr. Lewis: Yes.

Q. (By Mr. Drewes): May I have the photostatic copies, Mr. McNab?

A. (Witness producing).

Mr. Drewes: Your Honor, the Government will offer into evidence the original records identified by the witness, substituting therefor by stipulation photostatic copies.

The Court: They may be marked. [980]

The Clerk: As one collective exhibit?

Mr. Drewes: One collective exhibit.

The Clerk: U. S. Exhibit No. 52 in evidence, collective exhibit.

(Bank records, Bank of America, Fresno, were received in evidence and marked U. S. Exhibit No. 52.)

Q. (By Mr. Drewes): Mr. McNab, calling your attention to the records in connection with Account No. 3941 in the name of Mrs. J. Olender, do the records reflect a withdrawal on February 3, 1942, in the amount of \$1,000? A. Yes, sir.

Q. And is there a withdrawal slip?

A. Yes.

Q. Reflecting that withdrawal? A. Yes.

(Testimony of R. L. McNab.)

Q. What disposition, if any, do those records reflect in connection with that \$1,000 withdrawal?

A. Well, it shows it went—the records show it went to savings account No. 2146.

Q. And that account is in the name of Mrs. J. Olender? A. Yes, sir.

Q. And as to the records in connection with account No. 2146, do they show a withdrawal in the similar amount? A. No, sir.

Q. Again with particular reference to Account No. 3941, do [981] the records show that on March 31, 1943, there was another withdrawal in the amount of \$1,000? A. Yes, sir.

Q. And do the records which you have before you show the disposition of that withdrawal?

A. That shows it went to the commercial account of Mrs. J. Olender.

Q. Now with respect to the personal account of Mrs. J. Olender, do those records reflect a subsequent withdrawal of that amount?

A. No, sir.

Q. Again in connection with the account No. 3941 which you have identified, do the records show a withdrawal on January 6th, 1944, in the amount of \$2,000? A. Yes, sir.

Q. And is there a withdrawal slip covering that withdrawal? A. Yes, sir, there is.

Q. Do the records show the disposition of that withdrawal?

A. The records show it went to savings account No. 126.

(Testimony of R. L. McNab.)

Q. And in whose name is that savings account?

A. Terrys Olender Gambor.

Q. And do the records of that account No. 126 show any withdrawals in similar amount?

A. No, sir.

Q. Again with respect to account No. 3941, do the records [982] reflect the withdrawal on December 15, 1944, in the amount of \$1,000?

A. Yes, sir.

Q. And is there a withdrawal slip supporting that withdrawal? A. Yes.

Q. Do the records show the disposition of that withdrawal in the amount of \$1,000?

A. The records show it went to the commercial account of Mrs. J. Olender.

Q. And does the commercial account of Mrs. J. Olender show disposition of that \$1,000?

A. Would you repeat that question again, please?

Q. Does the commercial account of Mrs. J. Olender show a withdrawal of the \$1,000?

A. No, sir.

Q. Finally with respect to account No. 3941, do the records show a withdrawal on January 2, 1945, of \$3,000? A. Yes, sir.

Q. And is there a withdrawal slip reflecting that withdrawal? A. Yes, sir.

Q. And do your records show the disposition of that \$3,000?

A. The records show it was transferred to the savings account No. 126.

(Testimony of R. L. McNab.)

Q. And with respect to No. 126, that is the account you have identified as being in the name of Terrys Olender Gambor? [983] A. Yes, sir.

Q. And does that account reflect a withdrawal of \$3,000? A. No, sir.

Q. With respect, Mr. McNab, to savings account No. 126, in the name of Terrys Olender Gambor, do the records show any withdrawals during the period in question?

A. There is no withdrawals at all, sir.

Q. No withdrawals at all? A. No.

Mr. Drewes: No further questions.

Cross-Examination

By Mr. Hagerty:

Q. Mr. McNab, did you know Mrs. J. Olender, also known as Mollie Olender?

A. No, sir, only by the records, is all.

Q. Only by the records? A. Yes, sir.

Q. You would not know her handwriting?

A. Only from the records is all, yes, sir.

Q. Do you have her handwriting there in the records? A. We have signature cards.

Q. I show you two letters here and ask you if you can identify the handwriting of those two letters?

Mr. Drewes: I am going to object until the proper foundation is laid.

The Court: Overruled. [984]

Mr. Hagerty: You may answer.

(Testimony of R. L. McNab.)

Mr. Drewes: May I renew the objection, your Honor—in deference to the Court. Did the witness testify he knew the handwriting?

The Court: He asked him if he could compare them.

Mr. Drewes: Do you know the handwriting?

A. No, sir.

Q. (By Mr. Hagerty): You know the signature of Mrs. J. Olender or Mrs. Mollie Olender from the records in the bank, is that true?

A. Yes sir.

Q. You yourself had no personal knowledge of the woman, no personal acquaintance?

A. No, sir.

Q. And as far as these two specimens of handwriting are concerned, you cannot identify them, is that true? A. Yes, sir.

Q. You yourself know nothing of these transactions you have testified to other than what you see written on a record, is that true?

A. That is right.

Q. You yourself made none of those entries?

A. No, sir.

Q. So then of course you don't know whether Mrs. Olender carried amounts of cash with her and made payments on days [985] in question that would not be reflected in bank records?

A. Would you repeat that, sir?

Q. I will withdraw it and I will restate it.

You yourself would not know whether Mrs. J. Olender, also known as Mrs. Mollie Olender, carried

(Testimony of R. L. McNab.)

amounts of cash with her or cashier's checks, that she may have entered into transactions in similar amounts on the days that you testified to certain withdrawals being taken from one account and transferred to another

Mr. Drewes: Objected to.

Q. (By Mr. Hagerty): Is that true?

Mr. Drewes: Being improper cross-examination and also immaterial, irrelevant.

Mr. Hagerty: It is the very purpose of the Government witness.

The Court: All right, you may answer.

A. No, sir.

Q. (By Mr. Hagerty): You would not know anything about that, would you? A. No.

Q. The only things you can testify to are simply figures written on records there by somebody other than you, and all you can testify to is that they are the regular bank records kept in the regular course of your bank? A. That's right. [986]

Mr. Hagerty: No further questions.

Mr. Drewes: The witness may be excused.

The Court: The witness is excused.

(Witness excused.)

No. 13658

United States
Court of Appeals
For the Ninth Circuit.

MILTON H. OLENDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

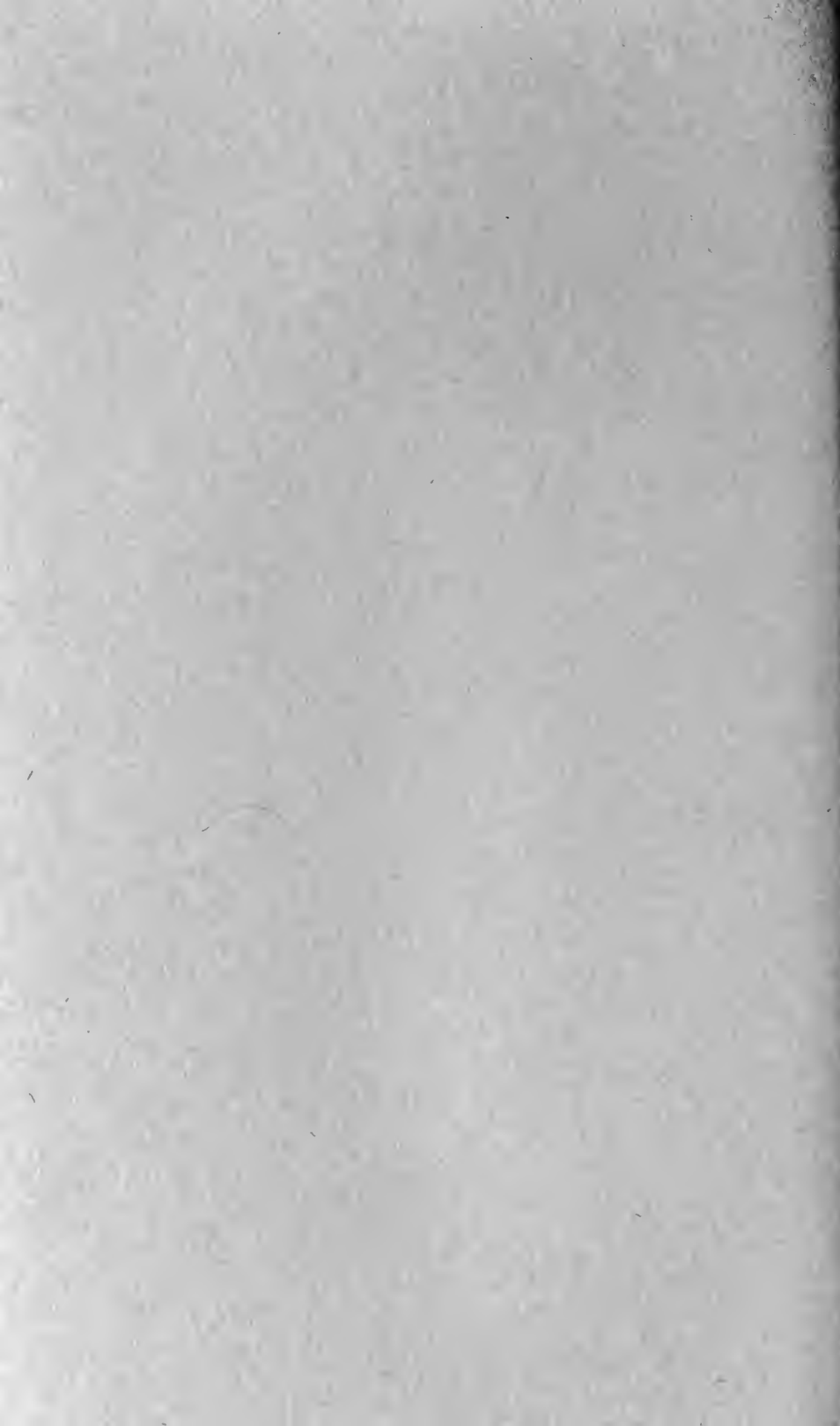
Transcript of Record
In Three Volumes
Volume III
(Pages 937 to 1421)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

MAY 14 1953

PAUL F. DIBBEN



No. 13658

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MILTON H. OLENDER,

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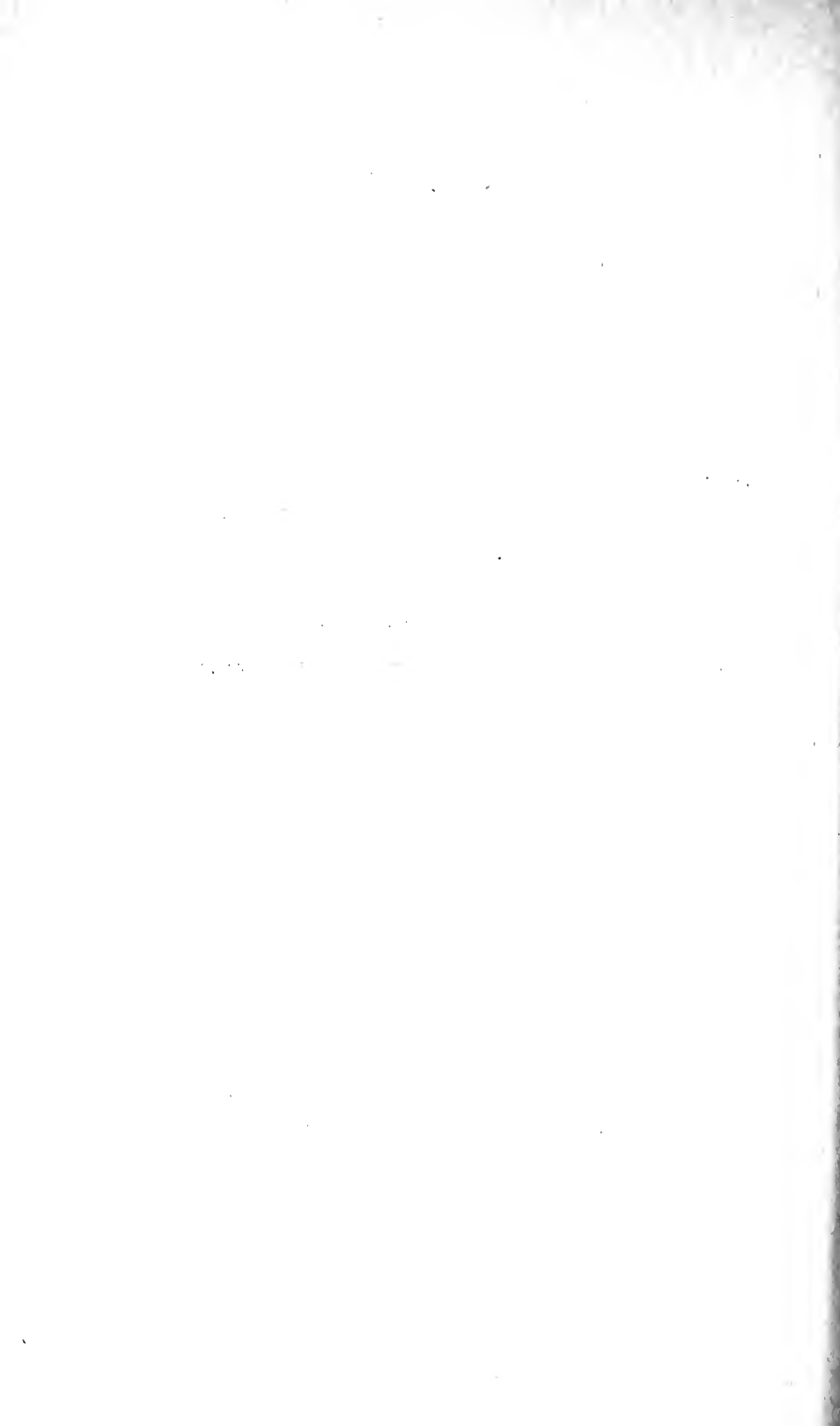
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Appeal from the United States District Court for the
Northern District of California,
Southern Division.



WILLIAM F. GAHURA

called by the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and Jury.

A. William F. Gahura. I work for the Security First National Bank of Los Angeles, Fresno Branch, Assisant Branch Manager.

Q. Your address?

A. I live at 270 Yosemite, Fresno, California.

Direct Examination

By Mr. Drewes:

Q. Mr. Gahura, you are an employee of the Security First National Bank in Fresno?

A. Yes, I am.

Q. As such you have access to the official records of that bank?

A. Yes, I do.

Q. In response to a subpoena which has been served upon you, have you brought with you the records pertaining to a savings account in the name of Mrs. J. Olender?

A. Yes, I did. [987]

Q. May I see them?

A. (Witness producing.)

Q. In addition to the ledger cards do you have withdrawal slips?

A. For the year '44.

Q. Yes. Give me what you have?

A. All right. (Witness producing.)

Q. Were these records kept in the ordinary course of business, Mr. Gahura?

A. Yes, they are.

(Testimony of William F. Gahura.)

Q. Do you have photostatic copies with you of these records? A. No. Not of those.

Mr. Drewes: Will it be stipulated that these may go into evidence?

Mr. Lewis: Yes.

Mr. Drewes: They will be so offered.

The Court: They may be marked.

The Clerk: U. S. collective Exhibit No. 53 in evidence.

(Thereupon bank records, Security National Bank, Fresno, California, were received in evidence and marked U. S. Exhibit No. 53.)

Q. (By Mr. Drewes): I hand you Government Exhibit No. 53, Mr. Gahura, State if you will, Mr. Gahura, whether the [988] records of the account which you have in front of you show that on July 5, 1944, a withdrawal was made in the amount of \$2500? A. That is correct.

Q. Does the Government Exhibit No. 53 include a withdrawal slip covering that particular withdrawal? A. Yes, it does.

Q. Can you state what the ultimate disposition of that sum of \$2500 was? A. No, I cannot.

Q. And why can't you?

A. The records were mislaid or lost. We are unable to find them.

Q. You have searched for them?

A. We searched for them for two days?

Q. You were unable to find them?

A. We are unable to find them.

(Testimony of William F. Gahura.)

Q. Are you able——

Mr. Hagerty: Then, if your Honor please, I will move to strike this as being incompetent, irrelevant and immaterial. There is no connection shown, that last question in reference to other records having been lost, as having any bearing or relationship with the issues in this case.

Mr. Drewes: I think it is pertinent, your Honor, to [989] establish there is no documentary evidence in connection with this particular withdrawal which will support or, for that matter, impeach testimony which is in the record.

The Court: I will overrule the objection.

Mr. Hagerty: We have no objection, your Honor, to the statement of withdrawal, but the ultimate disposition as to what became of it, that is what we are objecting to.

Q. (By Mr. Drewes): Are you able to state, Mr. Gahura, whether the withdrawal which is reflected on the ledger account was made in cash or otherwise? A. No, I cannot.

Mr. Drewes: No further questions.

Mr. Hagerty: We have no questions, your Honor.

(Witness excused.)

The Court: The witness is excused.

ROLAND HELLMAN

resumed the stand, and having been previously duly sworn, testified further as follows:

Cross-Examination

By Mr. Drewes:

Q. Mr. Hellman, you have testified that you are a licensed public accountant? A. Yes.

Q. Licensed by the State Board of Accountancy in the State of California? [990]

A. That's correct.

Q. When were you so licensed?

A. March 15, 1946.

Q. And you have also testified you were employed by the Bureau of Internal Revenue?

A. Yes.

Q. And you said something over five years, is that correct? A. Five and a half years.

Q. Five and a half years. Are you a certified public accountant, Mr. Hellman? A. No, sir.

Q. Do you have before you, Mr. Hellman, the illustration of net worth and net worth statement?

A. The illustration that was presented——

Q. Yes. A. As an example?

Q. As an example.

A. Of a simple net worth?

Q. Yes. A. Yes, I have a copy of it here.

Q. Did you not include in that illustration any reference to a treatment of non-taxable income?

A. No, there is no treatment of non-taxable income in there. This——

(Testimony of Roland Hellman.)

Q. However, earlier this morning you testified that [991] non-taxable income would be included in your calculations?

A. The calculation of what?

Q. In connection with your testimony this morning you referred to non-taxable portion of capital gains? A. That's right.

Q. And so the extent that non-taxable item is pertinent in the study of net worth, they would be included, would they not? A. Normally.

Q. And what is the effect?

A. I previously stated—You mean earlier?

Q. Yes. A. My testimony?

Q. Yes. A. The effect of—

Q. How is it treated?

A. —of non-taxable gains or the non-taxable portion?

Q. The non-taxable portion.

A. Non-taxable portion of capital gains result in the net worth increasing, but in computing net income based upon net worth method you would reduce the increase in net worth to arrive at the net income by the amount of the capital gain that is not taxable.

Q. That portion which is not taxable?

A. That's right. [992]

Q. You have not included in your illustration of net worth an example of an unallowable loss. If pertinent, would an unallowable loss be included in the calculation of the net worth statement?

A. An unallowable loss?

(Testimony of Roland Hellman.)

Q. Yes.

A. To what extent do you mean unallowable?

Q. Well, I am asking you, Mr. Hellman.

A. Well——

Q. If there is a loss which is not allowed, which may not be deducted——

A. Are you referring for tax purposes?

Q. Yes.

A. Well, a loss would—I don't quite—I think you better clarify your question a little bit, Mr. Drewes.

Q. I withdraw the question. You testified, Mr. Hellman, in connection with the unreported capital gain on the sale of the Riverdale Ranch in 1945 that the maximum tax payable was \$504 and might even have been less. Do you recall that?

A. If on the assumption that the capital gain was \$2016, a mathematical computation would show if it were a long term capital gain, 50 per cent of \$2016 would be \$1008, subject to a maximum tax of 50 per cent. I believe the year '45 under both methods computed, the income would be over the 50 per cent bracket. Therefore it would be limited to a [993] 50 per cent of half of the capital gain.

Q. That is the testimony to which I referred. I now show you the Government Exhibit No. 2, Mr. Hellman, which is the taxpayer's return for the year 1946, and I call your attention particularly to Schedule D and point out to you that a loss from sale of the Wilson Avenue property is reflected therein in the amount of \$909.34.

(Testimony of Roland Hellman.)

You see that item, Mr. Hellman? A. Yes.

Q. In connection with your testimony as to the tax due from the Riverdale—sale of the Riverdale Ranch, did you take into consideration the loss from the Wilson Avenue property which is reflected in that return?

A. You mean in these computations that were presented this morning?

Q. No, Mr. Hellman. In connection with your testimony to the effect that if the Riverdale property were sold at a profit of two thousand some odd dollars, as to this taxpayer that the tax due would be \$504. You recall that testimony?

A. I believe so, yes.

Q. Now in connection with that testimony did you take into effect the fact that the taxpayer had taken a loss in 1945 on the sale of the Wilson Avenue property as reflected in that return? [994]

A. That is the 1946 return. The loss on the Wilson Avenue property is in '46. You said he took a loss on the '45 return. This is the '46 return.

Q. What would be the effect of a capital loss reported by the taxpayer if there were a capital gain also realized in the same year?

A. Well, the loss would offset—would be offset either in whole or in part against the capital gain or the gain would be offset in part by the loss—I should say in whole or in part.

Q. The loss could not be taken in full if a capital gain were also claimed, is that correct?

A. No—if there were a capital gain, a capital

(Testimony of Roland Hellman.)

loss, both, they would be offset before you would take the net result into account.

I might add, Mr. Drewes, that this illustration of net worth was made up as an illustration for the Jury and it was deliberately kept simple so as not to confuse them and to give them an elementary example so that we could proceed from there. I didn't attempt to put in any complicated items in there such as the ones that you brought out.

Q. I understand that, Mr. Hellman. But to the extent that an unallowable loss is sustained by the taxpayer in a given year, that would also be taken into consideration in computing net worth, would it not? [995]

A. The unallowable loss, as I gather from your—you are talking about—is probably the stock transaction, and it is money actually—it would come under an item of a non-deductible expenditure if you didn't list it as an asset and if you had taken a strict interpretation, or, as I mentioned earlier, that the average—or as on this illustration of net worth here, pointing out on that, that the average business man construes net worth to mean the value of assets based on current market value, and if a man considered the stock as valueless and did not include it on the net worth statement as an asset, but he had spent five or ten thousand dollars during the year to purchase that stock, it would be taken in on computing the net income on the net worth basis as a non-deductible expenditure.

(Testimony of Roland Hellman.)

Q. Mr. Hellman, the Government Exhibit No. 2 reflects the taxpayer took a deduction of \$990 for a capital loss on the Wilson Avenue property. Is that correct?

A. Just the fact that he took it or the computation?

Q. Just the fact that he took it as shown in that return.

A. Without verifying mathematically the accuracy, which I presume is correct, yes, he did.

Q. If he had sustained a capital gain in the same year, would he have been able to take the entire \$990 as a capital loss?

A. Well, the loss would be—the gain would be offset, or [996] the amount of the loss would be offset against the gain, whether in full or in part.

Q. So if the gain from the Riverdale Property were included in the return, the tax due would be in excess of \$504, would it not?

A. You mean because of the difference in the tax rates between the alternative tax and the regular tax brackets?

Q. No, I don't, Mr. Hellman. A. No.

Q. The records show, Mr. Hellman, that the taxpayer did not report a capital gain in the year 1946 on the sale of the Riverdale property. Is that right?

A. That is right.

Q. Now if that had been reported and the tax thereon had been computed reflecting the capital loss on the Wilson Avenue property, the tax would have been more than \$504, is that correct?

(Testimony of Roland Hellman.)

A. If he is in a bracket over 50 per cent, but if he is in a bracket under 50 per cent, no, it would not.

I have a '45 tax rate schedule here. I can tell you if you want to know.

Q. I will withdraw the question and put it this way, Mr. Hellman. Would not the capital gain on the Riverdale property and the capital loss on the Wilson Avenue property be considered together in determining the tax due on capital gains? [997]

A. They would, but if you had a \$2016 capital gain and if you had a \$909.34 loss, as reported, you would have wound up with the capital—the capital gain would have been reduced by 50 per cent. Therefore the \$2016 capital gain would result in a long term capital gain of \$1008, and if this loss is computed correctly and was \$990.34, he would have had a net capital gain of \$17.66.

Q. Isn't it true that 50 per cent of the loss on the Wilson Avenue property is not allowable if there is a capital gain in the same year?

A. I didn't attempt to determine whether it was mathematically—Let's see.

Q. I am not concerned about the mathematical accuracy.

A. I don't know whether he—I would have to check it to see. Did he reduce the loss by 50 per cent or not?

Q. The Wilson Avenue property? A. Yes.

Q. He did not.

A. That is what I say, I don't know whether he

(Testimony of Roland Hellman.)

did or not, because I haven't checked the computation.

Q. Assuming that he did not reduce the loss by 50 per cent but took the loss in its entirety, would not the 50 per cent of it be not allowable if there was a capital gain in the same year?

A. It would be offset, that's right. You would take the [998] \$990.34 and compare it to the \$2016 again and you would have a net capital gain of \$1025.66, which you would take one-half of. That would be \$512.83 subject to a maximum tax of 50 per cent, and he was not in the 50 per cent bracket in '46 so it would not even result in that much tax, but the fact that he has already taken the \$900 would result in an additional tax, too.

Q. So an additional tax would be due?

A. But not in excess of \$504 that you mentioned.

Q. Your testimony is that it would not—the tax due would not be in excess of \$504 as heretofore testified by you?

A. By taking in—

Q. Will you calculate it, Mr. Hellman, and find out what the tax would be?

A. Give me the tax return back, please. You want me now to take the net income as reported and add in the capital gain, is that correct?

Q. I want you to consider the cumulative effect of the loss of \$909.34 as shown there on the Wilson Avenue property. Consider it with a gain of \$2116.

A. \$2116?

Q. On the Riverdale Ranch.

A. \$2116 or \$2016?

(Testimony of Roland Hellman.)

Q. \$2016.

A. You want me to take the loss as reported and take it as [999] a capital loss, that is, long term, reduce it by 50 per cent?

Q. That's correct.

A. Do you want the tax or the income figure? Do you have Mrs. Olender's return to see if they are on the same bracket? I believe they are.

Q. The tax, Mr. Hellman.

A. They are in a different bracket (witness referring to his records.)

Presuming that the loss reported, the \$990.34 were a capital loss, only allowable at 50 per cent, and the \$2016 capital gain was added to income for the year 1946, the net capital gain would be \$1025.66. The net increase in income would be 50 per cent of the capital gain or \$512.33, with the \$990.34 going out as having already been offset against the capital gain resulting in a net increase in income of \$1502.67.

Computed on the effective tax rate of income over \$10,000, her income was just 19 cents short of \$10,000, as per the return now—the figures are being based on the rate of—of the effective rate—resulting in 542.39 tax.

Q. Then your earlier testimony was not correct, Mr. Hellman?

A. On the facts given me it was correct. But upon the addition of the \$990 item, there is a change in the computation, yes. [1000]

Q. You did not take that \$990?

(Testimony of Roland Hellman.)

A. I wasn't asked. We were using a hypothetical question, Mr. Drewes.

Q. You state that you weren't asked. You mean you weren't asked by your counsel, Mr. Lewis.

A. Mr. Lewis asked me what the additional tax would be if we assumed a capital gain of \$2016 without any reference to any losses or any other points. I merely gave the maximum tax on the capital gain of \$2016.

Q. Mr. Hellman, do you have with you Schedule 1, the analysis of the Goodman transactions?

A. Yes, I have it here. Would you like these exhibits back, Mr. Drewes?

Q. I will take them back.

If your Honor please, this will require our attention for some time. I wonder if this is an appropriate time to recess.

The Court: We might take the noon recess, ladies and gentlemen. Do not discuss the case nor form an opinion until the matter is finally submitted.

(Thereupon an adjournment was taken until two o'clock p.m. this date.) [1001]

(Testimony of Roland Hellman.)

October 2, 1952—2:00 P.M.

ROLAND HELLMAN

called for the defendant, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination
(Resumed)

By Mr. Drewes:

Q. Mr. Hellman, will you tell us when you were first employed by Mr. Olender?

A. I was not employed directly by Mr. Olender. Approximately three or four months ago—I can't remember exactly, Mr. Lewis informed me that there would be some work to do on Mr. Olender's books. At that time——

Q. Did you begin work on the case about three months ago then? A. No.

Q. Will you tell us approximately——

A. I have to qualify that answer because I didn't—It's not complete.

Q. Go ahead.

A. I did look over Mr. Olender's books and briefly, very briefly, orienting myself with them.

Q. Fix the date.

A. To the best of my knowledge, I would say, four months ago.

Q. Approximately how much time have [1002] you——

A. At that time I spent——

(Testimony of Roland Hellman.)

Q. Mr. Hellman—just answer—

A. I am giving you half an answer. You are interrupting my answer.

Q. Mr. Hellman, if you will answer—

A. I hadn't done the actual work in this case until the last three weeks. Three or four months ago I started to do a little work, and it was put off due to the pending stipulation and so forth. I did no more work until approximately three weeks ago.

Q. Thank you, Mr. Hellman. Now I think we will get along better if you will just answer my questions, and if you wish to explain your answer, I am sure you will be given an opportunity by your counsel on redirect examination.

A. I would like to have a chance to answer the question in full when you give it to me, though.

Q. Approximately how much time have you spent on the case Mr. Hellman, just roughly to the best of your recollection?

Mr. Hagerty: Well, if your Honor please, I think that is more or less incompetent, irrelevant and immaterial how much time he spent on it, other than the point that was in question on cross-examination, when he started.

Mr. Drewes: It is a preliminary question, your Honor.

Mr. Hagerty: If he wanted to work 24 hours a day—

A. If it is important— [1003]

The Court: Do you have an estimate?

(Testimony of Roland Hellman.)

A. I can give you better than an estimate. Would you like to know counting my court time, since I have been in court?

Q. (By Mr. Drewes): Exclusive of court.

A. I would say close to a hundred hours.

Q. Thank you. Now, Mr. Hellman, do you have schedule one? A. I do.

Q. Do you have it in front of you?

A. Yes.

Q. I understand, ladies and gentlemen of the jury, you have schedule 1 with you.

Now directing your attention, Mr. Hellman, to the first item that appears thereon, the figure \$20,-550. A. Yes.

Q. Will you state what that represents?

A. The \$20,550 represents the figure of cash described as taken from the safe deposit box in January, in the early part of 1944, to purchase cashier's checks, 9 cashier's checks which were turned over to—which went to Mr. Goodman for the purchase of merchandise.

Q. Were you able to verify that that sum came from the vault as you have just testified?

A. That figure—that is based on Mr. Olender's testimony [1004] that that money, those cashier's checks were purchased from funds in the safe deposit box.

Mr. Drewes: I ask that the answer be stricken as non-responsive, your Honor.

The Court: Yes.

(Testimony of Roland Hellman.)

The question was were you able to determine.

Q. (By Mr. Drewes): Were you able to verify the source? Were you able to verify that that money came from the safe deposit vault, as you have just testified?

A. No, it is impossible to do that.

Q. Why was it impossible, Mr. Hellman?

A. Because I wasn't at the vault in 1944 to see it or trace the transaction.

Only the person that was there in 1944 could tell if that money came out of the vault.

Q. Were you able to find any records supporting your statement that the money came out of the vault?

A. Just the testimony of Mr. Olender.

Mr. Drewes: May that be stricken as non-responsive, your Honor?

The Court: Yes, that may go out.

Q. (By Mr. Drewes): Will you answer the question? A. Will you repeat the question.

Mr. Drewes: Will you read the question, Mr. Reporter?

(Question read by reporter.) [1005]

A. No.

Q. (By Mr. Drewes): Now how many suits did that represent, Mr. Hellman?

A. 822 suits.

Q. And how do you know that?

A. The suits were \$25 apiece, from mathemati-

(Testimony of Roland Hellman.)

cal computation. Also the checks total up to \$20,550.

Q. How do you know that the suits cost \$25, Mr. Hellman?

A. That is the price that he was—there was a subsequent—that information is based on what Mr. Olender stated he paid for the suits.

Q. Were you able to find an invoice or any other records supporting that testimony?

A. There is no invoice on this item.

Q. Did you find any other records supporting the fact that the price was \$25 per suit?

A. On the Goodman suits?

Q. Yes. A. No.

Q. So the fact that there were 822 suits is an arithmetical result arrived at by you by dividing that particular figure of \$20,550 by 25, is that correct?

A. After determining that the money paid to Goodman totaled \$20,550, and the suits were at \$25, we arrived at 822 suits on a mathematical basis. [1006]

Q. Now, moving down the float check, as it has been called, on the left hand side, there is reflected there the figure of \$7,000.

Upon what is that figure based, Mr. Hellman?

A. The \$7,000 is based upon information in that through Mr. Levy there were \$7,000 proceeds turned over to Saraga to purchase additional merchandise, which also was shown on Mr. Saraga's books as being received, \$7,000. Inasmuch as the

(Testimony of Roland Hellman.)

—Mr. Levy and Mr. Olender stated that Mr. Levy had made these sales, the amount of \$7,000 considered to be for 200 suits.

Q. Does that complete your answer?

A. Yes.

Q. How do you know they are Goodman suits, Mr. Hellman?

A. They are suits that Levy had the funds of \$7,000 for that he was selling Goodman suits.

Q. How do you know they were Goodman suits that were sold? How do you know they weren't some other suits presently held by the defendant?

A. At the time I made up this chart it was Mr. Olender's statement that it was the suits that he had received from Goodman that were sold by Levy and the funds or proceeds which Mr. Levy kept and turned over to Saraga.

Q. Were you able to find any other evidence other than Mr. Olender's statement they were Goodman suits? [1007]

A. Only the inventory, the purchase records which would indicate that he didn't have that many suits from any other source to sell.

Q. The purchase records as of what date, Mr. Hellman?

A. The purchases indicated in Mr. Olender's books of merchandise purchased during 1944 and the first part of 45.

Q. Does the purchase record to which you refer reflect the purchase of these Goodman suits?

(Testimony of Roland Hellman.)

A. No, those are the suits that were not taken on the books.

Q. Then how do you support your conclusion that these are Goodman suits that were sold by Levy?

A. It has been testified to by Mr. Olender, by the Government agent, that they could not find any records other than this one transaction where Mr. Olender had made any purchases, other than this Goodman deal, that was not put on the books.

Mr. Drewes: May that be stricken as non-responsive.

The Court: That may go out.

A. I am trying to——

Q. (By Mr. Drewes): If the Goodman transaction is not reflected in the purchase register of the defendant, Mr. Hellman, how do you know that the suits sold by Mr. Levy were Goodman suits? [1008]

A. Because it was testified to.

Q. Were you able to find any other evidence supporting the fact that those suits were Goodman suits other than the testimony of the defendant?

A. No.

Q. How do you know, Mr. Hellman, that the amount was \$7,000?

A. That is the amount Mr. Saraga received from Mr. Levy for Mr. Olender.

Q. Do you recall Mr. Levy's testimony?

A. I believe I do.

Q. He testified, did he not, that he sold certain suits of a value between 6 and \$7,000 for Mr.

(Testimony of Roland Hellman.)

Olender and took the proceeds to New York, did he not? A. That's right.

Q. Why do you select the sum of \$7,000?

A. Because Mr. Saraga's books indicated that he received \$7,000 from Mr. Levy.

Q. Mr. Levy testified, did he not, that he sold for Mr. Olender 250, 300, or 320 suits, is that correct?

A. He was uncertain as to the exact amount, yes.

Q. Then how do you know that he sold 280 suits?

A. Once again you have a mathematical formula, and also verified by the receipt by Saraga of \$7,000.

Q. You determined the number of suits sold by Mr. Levy by [1009] dividing \$7,000 by \$25, is that correct? A. That's correct.

Q. If in fact Mr. Levy sold suits other than Goodman suits which would have been acquired at a different price, the result would not be the same, would it? A. Would you repeat that.

Mr. Drewes: Mr. Reporter, will you read that back, please?

(Pending question read back by reporter.)

Mr. Lewis: Your Honor, I will object to that question because the only testimony in the record is Levy's testimony and Olender's testimony that they were Goodman suits.

The Court: Overruled.

(Testimony of Roland Hellman.)

Mr. Drewes: Answer the question, Mr. Hellman.

A. On the assumption that there were some suits other than the Goodman suits at a different price, it would effect the computation in this chart naturally.

Q. Now, calling your attention to the right hand side of the chart, Mr. Hellman, the first item appearing thereon, the figure of \$5,000.

Upon what is that item based?

A. That is based on the deposit that was made in the store account on June 19, 1945, and upon the testimony of Mr. Olender and Mr. Levy—principally—and Exhibits in evidence that Mr. Lerman paid through Mr. Levy to Mr. [1010] Olender, \$5,000 for 200 suits at \$25 each.

Q. Now the next item is the sum of \$8,550. What is that figure based upon?

A. That figure is based upon the difference between the known factor—\$5,000 is a known factor, the \$7,000 is a known factor, making \$12,000, the difference being \$8,550.

Q. You arrive at that figure by subtracting the \$7,000 and the \$5,000—the total of \$7,000 and \$5,000 from the beginning figure of \$20,550, is that correct? A. That's correct.

Q. How many suits does that represent, Mr. Hellman?

A. The \$8,550 represents 322 suits—excuse me—342 suits.

Q. Now, is it your testimony that those suits were taken into inventory?

(Testimony of Roland Hellman.)

A. My testimony that they were taken into inventory?

Q. Strike that. Do I understand that those suits were taken into inventory by Mr. Olender in the Army and Navy Store?

A. At what date?

Q. I am asking you, this is your chart.

A. Yes. My understanding of the testimony, based on Mr. Olender's testimony, is that the balance of the suits, of the 342 suits, the remaining balance of 322 suits are taken into inventory as of December 31, 1945. [1011]

Q. Mr. Hellman, how do you know that 322 suits were included in the inventory as of the date mentioned?

A. Through Mr. Olender's testimony.

Q. Were you able to verify that?

A. The inventory sheets show that many suits of that classification on—right on the inventory sheets.

Mr. Drewes: Ask that be stricken as being non-responsive.

Mr. Hagerty: Well, if your Honor please, I think it is responsive.

The Court: I think that that is the witness' answer. That is the answer.

A. Yes, sir.

The Court: That may remain.

Q. (By Mr. Drewes): Were you able to verify the 322 suits were Goodman suits?

A. Through Mr. Olender's testimony, yes.

(Testimony of Roland Hellman.)

Q. You are relying exclusively on Mr. Olender's testimony?

A. He is the only one that has knowledge of these matters.

Mr. Drewes: May that be stricken as non-responsive.

Mr. Hagerty: I think it is cross-examination, your Honor. He is asking for it.

Mr. Drewes: This man is testifying, your Honor——

The Court: That may go out. That may go out.

Q. (By Mr. Drewes): You testified you are a licensed [1012] public accountant, Mr. Hellman?

A. That's right.

Q. You prepared this schedule, did you not?

A. Yes.

Q. I ask if you are able to verify that 322 suits shown in the inventory under December 31, 1945, were in fact Goodman suits?

A. It is impossible to verify that personally.

Q. Were you able to verify it?

A. I answered, did I not, that it was impossible to verify it?

Q. I would like a yes or no answer for the record. A. No.

Q. Now included in the \$8,550 figure there is also 20 suits which were shown here as sold through the store registers.

Were you able to verify those sales?

A. As going through the store registers, no.

(Testimony of Roland Hellman.)

Q. Were you able to verify that those were Goodman suits? A. No.

Q. Were the 342 suits valued at \$8,550 included in the taxpayer's income tax returns, federal or state, as inventory in the years 1944 and 1945?

A. You say 342 suits?

Q. That's correct. [1013]

A. Not on both years' returns.

Q. Mr. Hellman, the sale of 280 suits, allegedly Goodman suits at \$7,000, and the sale of the alleged Lerman suits at \$5,000 were presumably made at cost, is that correct?

A. That is correct, yes, sir.

Q. And the balance of 342 suits were subsequently alleged to have been taken into inventory at cost, is that correct?

A. 322 of the 342 were taken into inventory at cost. No, they were not taken in at cost. They were taken in at cost or market. They were taken in at 50 cents less. \$24.50 as of December 31, 1945.

Q. How do you know that, Mr. Hellman?

A. The inventory sheets show 322 suits at \$24.50, and Mr. Olender testified those were the suits in question.

Q. Do the inventories to which you refer show the figures of \$24.50 as the cost or market?

A. The figure itself as it sits there, it doesn't say that, but there are other suits on the same inventory at \$24.50, and the current purchases around that period indicating that is the current market value, \$24.50.

(Testimony of Roland Hellman.)

Mr. Drewes: I ask that be stricken as a conclusion of the witness.

A. It is not a conclusion.

The Court: The answer may stand.

Q. (By Mr. Drewes): Were you able to verify the cost of the [1014] suits, Mr. Hellman?

A. You are referring to the 322 suits?

Q. Yes.

A. I answered that already, Mr. Drewes. That I couldn't verify the original invoice because there wasn't any.

Q. What about freight, Mr. Hellman, did you take into consideration the cost of freight?

A. There's been no record of any amount paid for freight, whether it was included in the original amount or not is not shown.

Q. Were you able to find any freight bills paid, as reflected in the taxpayer's records, concerning these particular transactions?

A. I didn't search for them. It is possible we might find them in the books.

Q. Did you look for them?

A. I did not look for them, no.

Q. With respect to the 20 suits which were allegedly sold through the cash registers, Mr. Hellman, you treat those on your float chart as having been sold at cost?

A. No, they are merely deducted from the 342. The receipts from those—the proceeds of the sales would be included in along with the regular sales rung up on the register.

(Testimony of Roland Hellman.)

Q. There would then presumably be a profit on the sale [1015] of those 20 suits?

A. Presumably, if he sold them above his cost, which is generally understood he would.

Q. Did you verify or ascertain in any way the price at which those suits were sold?

A. It was impossible to do that. There has been testimony there was no individual record kept of individual sales. We wouldn't have any way of knowing what the exact selling price was of those suits, except through Mr. Olender's testimony.

Q. Did you ask him?

A. Yes, I believe I did. He mentioned somewhere in the \$30—which was material as to what they really sold for on the retail basis. I didn't press it further because it had no value—

Mr. Drewes: I ask that answer, your Honor, as to the materiality or immateriality be stricken.

The Court: Motion is denied. It may remain in the record.

Q. (By Mr. Drewes): Now with respect to the alleged sales of these suits, Mr. Hellman, have you determined what sales were made in 1944 and what sales were made in 1945?

A. Of the Goodman suits?

Q. Yes.

A. Of the original \$20,550 worth? [1016]

Q. Yes.

A. There is no actual determination when the—other than through—I personally could not de-

(Testimony of Roland Hellman.)

termine when they were sold. There has been testimony that 200 suits sold by Levy for \$7,000 was sometime in the spring of 1945. But I could not determine for myself whether they were actually 45 or earlier, sometime in 44.

I said 200 suits. I meant the 280 suits sold by Levy.

The \$5,000 worth of suits, the 200 suits sold through Lerman, was established to have been sold June of 45, based upon the cashier's checks of Mr. Lerman in evidence.

Q. Do you know when the 20 suits which were sold through the register were sold, whether in 44 or 45? A. No, I do not know that.

Q. Now, Mr. Hellman, will you turn to your revised schedule 4, "Disposition of Cash in Safe Deposit Box." Mr. Hellman, you prepared schedule 4 which is before you?

A. With the assistance of Mr. Lieberman, yes.

Q. What was your answer?

A. With the assistance of Mr. Lieberman.

Q. Who is Mr. Lieberman?

A. He is Mr. Lewis' associate.

Q. You assume responsibility for the accuracy of this?

A. Mathematical accuracy and the points—do you mean the [1017] items on here or the mathematical accuracy?

Q. Both. A. Yes.

Q. And is it a complete recapitulation of cash transactions in and out of the vault for the periods shown, Mr. Hellman?

(Testimony of Roland Hellman.)

A. Every transaction we could uncover is, as I stated earlier, is not—cannot be construed as being entirely accurate, inasmuch as we were reconstructing something that happened from 8—6—some eight years ago. We attempted to go through every transaction that was made——

Q. Tell us what you did do?

A. The starting point was the——

Q. I don't want you to go over every item, item by item, Mr. Hellman. Just tell us in a general way.

A. In a general way.

Q. What you did in creating this particular schedule.

A. The starting point was Mr. Ringo's partially completed analysis as per the schedule, Exhibit 45 in evidence now.

We started with Mr. Ringo's partially completed work and finished.

Mr. Drewes: May I ask that "partially" be stricken as being the conclusion of the witness?

A. I don't think it is a conclusion.

The Court: Overruled. Motion is denied.

A. It has been proven that we have definite changes to Mr. [1018] Ringo's statement and therefore it is not complete.

Q. (By Mr. Drewes): His Honor overruled my objection. Continue with your recital of what you did in constructing this schedule, Mr. Hellman?

A. We started with the statement of Ringo and further identified transactions.

(Testimony of Roland Hellman.)

Q. Where did you identify them, where did you go, what did you do?

A. As an example, the transfer—in an analysis—in analyzing the personal bank account it was determined there were certain cash deposits; traced through to the bank, checked the original deposit tickets, and determined that these cash deposits were made. By conferring with Mr. Olender he had made the statement that these had come from cash in the vault. So we put them on the list.

The gifts from the mother were determined from previous—as for Mr. Ringo's statement plus verification, further verification from Mr. Olender, as to the dates or approximate dates.

You know, money going into a vault, one or two days this side or the other side would—you can't state specifically that that is the date that he went in and put it in or took it out, unless you have actually the bank's record of the date of entry into the safe deposit box. [1019]

But the approximate date is shown.

Q. Did you examine the bank's record to determine the dates of entry?

A. No, I didn't. I don't believe they are available.

Q. Go on.

A. The other items were handled in much the same manner. Certain items, it just became evident in the last week or so, such as the Olender-Elkus account, which is one of the reasons we had to revise this just three or four days ago. We

(Testimony of Roland Hellman.)

hadn't uncovered that but it came up—it was discovered, it was included in the net worth statement as presented by the Government. Therefore, we should account for the source of that, and Mr. Olender stated it had come out of the safe box.

Q. Well now, then, Mr. Hellman, calling your attention to the first item, May 5, balance in the safe deposit box \$75,000. Upon what do you base that?

A. That is based upon the testimony of Mr. Olender and the affidavit of Monroe Friedman. They counted over \$70,000 as of May 5. Mr. Olender's statement was it was \$75,000.

Q. The \$75,000 figure is not based on the affidavit of Monroe Friedman as indicated on this schedule.

A. The affidavit says "Over \$70,000."

Q. And the \$75,000 figure was arrived [1020] at—

A. Through Mr. Olender's statement.

Q. Based on Mr. Olender's testimony. Were you able to verify that in any way from any record?

A. There were no records kept of the money in the vault.

Q. Now calling your attention to the next item, which is an addition dated May 5, in the amount of \$7,500. Upon what did you base that?

A. Upon Mr. Olender's statement that was the approximate amount, was between five and \$10,000—this in between figure of \$7,500.

(Testimony of Roland Hellman.)

Q. You just split the difference?

A. Well, you might say split the difference. It was a half figure between the ten and the five. It was—at one time I believe Mr. Olender stated he thought it was close to that figure.

Q. Would it not be conservative accounting practice in preparing a schedule of this kind to adopt the lower of two figures which were possible?

A. Well, in this particular case if we would have adopted that figure as a lesser net worth at the end of 44—by only adding \$5,000 instead of \$75,000 we would have reduced the net worth at the end of each year. Subsequently in 1946 the net worth would be \$2,500 less and we would have \$2,500 less income computed upon the net worth method. So that it's not to the [1021] defendant's—it's to the defendant's disadvantage to have \$7,500 in there.

Mr. Drewes: May that be stricken as not responsive, your Honor?

The Court: Yes, that may go out.

Mr. Drewes: Mr. Hellman, will you answer the question that I propounded to you?

A. Will you repeat the question?

Mr. Drewes: Will you read the question, Mr. Reporter.

(Pending question read by the reporter.)

A. Conservative in which sense, Mr. Drewes?

Q. (By Mr. Drewes): Well you are a licensed public accountant, are you not?

A. That's correct.

(Testimony of Roland Hellman.)

Mr. Haggerty: If your Honor please——

Q. (By Mr. Drewes): Where the——

Mr. Hagerty: I am going to object to this line of questioning. I think it is argumentative. I think the answer that has been stricken was really a proper answer. He is asked as to conservative accounting practices. Conservative accounting practices would understate your position always, costs or marketing, whichever is the lesser income, and if we had adopted the lesser figure that had been stated, we would have shown that his income would not have been understated in that first year. That would [1022] have been conservative.

The Court: You can argue the matter hereafter, Mr. Hagerty.

I think counsel may pursue his examination in his own way. He is entitled to examine this witness on the subject matter of his reports.

If the witness has any explanatory notes to make, it is perfectly all right if he makes them.

But the last answer was not responsive and it was an argument.

A. Your Honor, I believe the term “conservative” is subject matter of interpretation in this matter.

The Court: All right. You might define that as you view it, what you had in mind as a conservative approach, if you wish.

A. From the over-all viewpoint, if you consider conservatism in this particular case, it is to Mr. Olender’s disadvantage. Therefore it would be

(Testimony of Roland Hellman.)

conservative, would it not, to take this in at \$7,500?

Q. (By Mr. Drewes): Is it not true, in examining schedule 4, Mr. Hellman, that if you reduce that figure to \$5,000 you would end up as of December 31, 1946, with a negative figure?

A. I don't believe you made the change on your schedule on this Gray and Magnin items that were taken off the schedule. [1023]

Mr. Drewes: I ask that be stricken. I haven't asked the witness anything, your Honor, about the Gray and Magnin transactions.

A. Mr. Drewes, that is what accounts for the final balance on this sheet. The final balance of cash on hand is not \$385 but \$2,639.76, after the adjustment that was taken out of \$2,254.74.

Q. I beg your pardon, Mr. Hellman, I didn't have that correction. You are absolutely correct. Withdraw my question.

Calling your attention to the next item June 16 transfer to personal account \$100, and the following two items, also in June, the 22 and 27th of \$400, \$1,500. Upon what are they based, Mr. Hellman?

A. I believe my testimony yesterday, when Mr. Lewis was examining me, was that the \$100, \$400 items are in accordance with Exhibit AD and from the testimony of Mr. Olender, and the \$15 item I personally verified at the bank. The bank did not send over the duplicates—the copy of the deposit as they did for the other ones, but I can say that

(Testimony of Roland Hellman.)

I personally verified that at the bank and saw that there was a cash item, and based upon Mr. Olender's testimony that these items would come from cash, it was put on this schedule.

Q. When you said you verified them, what did you verify? [1024]

A. I verified the deposit tickets to ascertain there was a cash deposit of \$1,500 on that day.

Q. Is that true of each of those three items?

A. I did it on all of the items, yes. But on the other ones we can use the Exhibits as prepared by the bank, but this particular one the bank failed to send it over.

Q. You verified the receipt of the money by the taxpayer. You did not verify the source of the money, did you?

A. I verified the receipt by the bank, you mean?

Q. Yes. In each case it is your testimony the bank records show that the taxpayer got those sums, is that correct?

A. That's right.

Q. And they were deposited into his account?

A. That's right.

Q. Were you able to verify the source of those three cash items?

A. Not actually verify. Just through testimony given.

Q. And upon what testimony do you rely?

A. On Mr. Olender's testimony.

Q. And would you please give us that testimony, as you recall it?

(Testimony of Roland Hellman.)

A. I think it is rather lengthy. If you want to give me the transcript I will read it to you.

Q. I prefer you to give it to me just as you recall it? [1025]

A. I don't believe I have—do I have to give—I think it is rather lengthy.

The Court: Give your summary of it, Mr. Witness.

A. The general testimony was that cash other than from bank accounts or business or income as estates, such as dividends or partnership income and rents, was cash taken from the safe deposit box. That was his general testimony. I think it is pretty well outlined in pages 779 and 80 of the transcript, if you care to look.

Q. (By Mr. Drewes): Thank you. Is it not true that this specific item to which we are referring, transfer to personal account in the month of June, are included in schedule four upon the assumption that they must have come from the cash vault because they cannot be shown to come from any other source?

A. That is what Mr. Olender testified, yes.

Q. The Goodman transactions, Mr. Hellman, which you have testified and to which much reference has been made, were not reflected on the books of the taxpayer, were they?

A. On the store books, no. At the initial stage, no.

Q. Is it not possible that receipts of cash as reflected in his accounts could not have come from other unreported sales of merchandise?

(Testimony of Roland Hellman.)

A. When you say it is possible there could have been other sales, do you mean—— [1026]

Q. Other sales similar to the Goodman sale?

A. It is possible in any case for something like that to happen, yes.

Q. Can you state of your own knowledge the three items to which we are referring on schedule 4 did not come from sales of merchandise which are not reported on the books?

A. Not of my own knowledge. Other than, sir, what I have been told or heard in testimony here.

Q. Again referring to the three items, Mr. Hellman, \$100, \$100, and \$1,500, shown as withdrawals from cash in June of 1944. Could those not have been redeposits of cash withdrawn from the bank accounts at an earlier time?

A. When you say redeposits of cash withdrawn from the bank account at an earlier time, redeposits where?

Q. It is my understanding——

A. Oh, I see. You mean instead of going through the safe deposit box, it would be drawn out an earlier date and then put back into the same account?

Q. Exactly. A. It did not occur——

Q. Mr. Hellman, would you please answer my question, then explain if you wish?

A. It is possible.

Q. Now—— A. However—— [1027]

Q. You may explain.

A. For the 1944—the first month prior to this,

(Testimony of Roland Hellman.)

the first six months of the year, there were no withdrawals from the commercial account or the savings account in like amounts which might be construed as being these specific items.

Q. Could the cash not have been withdrawn in an earlier year and subsequently deposited?

A. That's possible, but if you would—it's possible also, as Mr. Olender, testified, he carried fairly large sums of cash in his pocket. I mean, it's hard to actually distinguish between—to exactly say how much of the cash is in the safe deposit [1028] box—and how much he has in his pocket at a specific moment, but I say this you can't—the schedule can't be tied down to the exact date, that this was the specific date that the transaction occurred.

Q. Is it not possible, Mr. Hellman, that those deposits could result from withdrawals from other bank accounts other than the same account?

A. Not the known bank accounts. I believe they are all known at this time. They were checked to see that there were no withdrawals on those specific dates from other savings accounts.

Q. Could they not have been deposits from withdrawals of other accounts at an earlier year?

Mr. Hagerty: If your Honor please, I will object to that question as a hypothetical question not based on the evidence.

The Court: Overruled.

A. Well, if it were a withdrawal from a savings account at an earlier year, and he had the cash in

(Testimony of Roland Hellman.)

his pocket, and then decided to put it in his commercial account, it would have the same—well, actually you would consider that as an additional. I think I am getting my answer mixed up. Would you repeat that question?

The Court: You can strike your answer and rephrase your answer. [1029]

A. I wonder if the Clerk would read the question to me?

The Court: Mr. Reporter, would you read the question?

(Pending question read by reporter.)

A. If we assume that the deposits to his commercial account in these three dates in June had been previously taken from some other bank account and then deposited in at this time prior to—I said that I checked back to the first of '44 and not back beyond that—it's—it could be possible if he were carrying the cash in his pocket for that length of time, yes.

Mr. Drewes: Is it not possible, Mr. Hellman, that the deposits to the personal account to which we are referring, May and June of 1944, may have been funds taken from unreported sales in the Army and Navy Store?

A. Well, income from that source or any source, if you are going to make that assumption, that they are unreported sales——

Q. You made the assumption, Mr. Hellman.

A. What assumption?

(Testimony of Roland Hellman.)

Q. That all of these withdrawals must have come from the cash vault.

A. Yes, based upon what Mr. Olender testified. There has been no testimony there has been any unreported sales other than these specific Goodman items, which were sales [1030] at cost and were not put on the books.

Q. In connection with the answer which you just gave, Mr. Hellman, is it not true that the net worth approach to the measurement of income is used when it is other impossible to determine what the true income of the taxpayer is?

A. When you say "used," you mean used by the Government in determining whether the proper tax liability has been paid?

Q. Or by others.

A. Only in cases after an exhaustive attempt to determine if the books are correct and make adjustments which are made and then it is determined that the books are so far off, in error, or it can be used as a check—generally as a check more than anything else, to determine if the books are correct. If it establishes that the books are entirely wrong, then you would use that method.

Originally it is only a check to see if the books are correct.

Q. I am going to show you Government's Exhibit number 25 for identification and ask you if you have seen this before?

A. Yes, I have seen this.

(Testimony of Roland Hellman.)

Q. The first page reflects that cash in store is reduced between 1941 and '47; you recall examining that item? [1031]

A. Examining to what extent?

Q. Do you recall seeing it before?

A. I saw that on the sheet here, if that is what you mean, yes, as of December 31, 1941.

Q. And what is indicated as the disposition of the \$1,500? A. Which amount?

Q. Look at item number 5.

A. Item number 5.

Q. Refresh your recollection thereby. And you see the explanatory note at the bottom, Mr. Hellman? A. Yes.

Q. What does that indicate?

A. Deposited \$1,500 in personal bank account in 1945.

Q. What treatment, if any, did you accord that particular item in the preparation of schedule 4?

A. I don't know that I particularly treated that item. There is a deposit—if it is the same deposit—we didn't locate any \$1,500 deposits in the personal bank account at 1945, and there is no—I don't have the actual basis for where this statement came from. I thought the records we had were better than this record, so we used the records we had. Let me check again to see that I don't have that on my list of deposits.

The Court: You might make that check during the recess. [1032] The Court intends to take the

(Testimony of Roland Hellman.)

adjournment for the day, ladies and gentlemen. We will resume tomorrow at ten o'clock.

So if you have any checking, in the light of that question, you may do it.

And the same admonition to you, ladies and gentlemen, not to discuss the case under any circumstances or conditions and not to form an opinion until the matter is submitted to you.

(Thereupon an adjournment was taken until Friday October 3, 1952, at 10 o'clock [1032A] a.m.)

October 3rd, 1952—10:00 A.M.

The Clerk: United States of America vs. Olender, on trial.

The Court: You may proceed.

ROLAND HELLMAN

resumed the stand, and having been previously duly sworn, testified further as follows:

Cross-Examination (Resumed)

The Clerk: Mr. Hellman, would you please restate your name for the record?

A. Roland Hellman.

By Mr. Drewes:

Q. The transcript shows, Mr. Hellman, that when we recessed yesterday, I had called your at-

(Testimony of Roland Hellman.)

tention to an item of \$1,500 reflected in the first page of the Government Exhibit No. 25 for identification. I posed this question:

“What treatment, if any, did you accord that particular item in the preparation of Schedule 4?”

Would you answer that question?

A. The deposit—item 5 on Exhibit—do you want me to work from the exhibit? I have a copy of it here. If you want to give me the one in [1033] evidence——

Q. I believe the record shows that this particular——

A. Yesterday when you were questioning me you had given me a copy of the Government exhibit.

Q. I gave you a copy?

A. I was reading from the Government exhibit yesterday. Do you want me to refer to that again?

Q. I gave you that for the purpose of refreshing your recollection, Mr. Hellman. That is not in evidence.

A. All right. That particular item, during our verification of the cash account, was not located as a personal deposit to Mr. Olender's bank account. Therefore indicating an inaccuracy in this statement, and we did not take into our computation because it could not be found as a personal deposit in the year 1945.

Q. Did that \$1,500 go into the vault?

A. There is no record to indicate that it did.

Q. Mr. Hellman, I show you Government Ex-

(Testimony of Roland Hellman.)

hibit No. 15, which is the stipulation made in the record in this trial, and ask you if the \$1,500 item to which you have just referred is not reflected in the very first item?

A. The stipulation indicates a reduction in the cash in the store register from the end of 1944 to the end of 1945 from \$2,500 to \$1,000 or a difference of \$1,500.

Yes, it does.

Q. Didn't you check the various items on that stipulation, [1034] Mr. Hellman?

A. On the cash—yes, we did.

Q. And your testimony is that you found no record of the disposition of that \$1,500?

A. Not during the year 1945, no.

Q. Did you find any record during any of the years?

A. Not specifically identifiable as being that \$1,500.

Q. Why didn't you assume that that went into the vault?

A. It was an item covered by stipulation and it wasn't deemed that it would be taken into account in this consideration here.

Q. The stipulation specifically reserves to the parties the right to introduce evidence concerning the source or disposition of the items shown therein, does it not? . . . A. I believe so.

Q. What effort did you make to determine disposition of that sum?

A. I discussed it with Mr. Olender.

(Testimony of Roland Hellman.)

Q. What did he say?

A. He was uncertain as to whether the reduction was actually in 1945 or 1946. There was also something regarding the theft of some money from the store which was not brought in.

Q. Mr. Hellman, I show you the Government's Exhibits 1 and 2, which are the taxpayer's returns for the years [1035] 1945 and 1946, and I will ask you if they do not reflect the receipt of income from dividends and bond interest in each year; if so, will you state the amount?

A. The year 1945 indicates dividends of \$15 and bond interest of \$575.60.

Q. And for the year 1946?

A. For the year 1946 we have dividends of \$1,572.50 and bond interest of \$1,720.17.

Q. What disposition did the taxpayer make of those sums as reflected by his books of account and records?

A. The taxpayer stated to me that all of those——

Q. Will you please answer the question?

A. You said what disposition did he make.

Q. Yes. As reflected by the books of account and records of the taxpayer.

A. There were no written records other than bank deposits.

Q. And did you find bank deposits which you were able to identify as representing the receipt of bond interest and dividends by the taxpayer in those two years?

(Testimony of Roland Hellman.)

A. I was able to trace specifically but there were deposits in his personal bank account indicating the receipts of amounts in '45 and '46 that could represent either interest or dividends, and inasmuch as I was told by Mr. Olender that he banked all of his bond interest money and the dividends, I did not verify further or attempt to determine [1036] whether that did go into the bank vault or instead of the personal deposits.

Mr. Drewes: I will ask that that part of the answer which refers to what was stated by the taxpayer be stricken as not being—

The Court: It may be the basis upon which you formulated your opinion?

A. Yes, sir, your Honor. When I had made the audit, I had to depend on something. I was at least making inquiries as to what happened and trying to run them down, which certainly wasn't done in the other instance.

Q. (By Mr. Drewes): Apart from what was stated to you by Mr. Olender, were you able to trace the receipt of bond interest and dividends for the years in question into his bank account?

A. There were no—I did verify the original deposit ticket indicated thereon. I did not have the breakdown of the individual amounts of bond interest, bond—bond interest or dividends.

Q. So that it was impossible to specifically identify the receipt of those funds and tie them into the deposit slips, is that correct?

(Testimony of Roland Hellman.)

A. Without having the detail of the exact amount for each time they were received.

Q. It is possible, is it not, Mr. Hellman, that the items [1037] shown on Schedule 4, "Transfers to personal account," might include the receipt of bond interest and dividends?

A. If the checks were cashed that he received in payment of those items, interest of dividends, and he chose to put them in the safe box, they could have gone in there—on that assumption, yes.

Q. You cannot state that various items on Schedule 4 shown as transfers to personal bank account from the vault do not include the receipts by the taxpayer of bond interest and dividends, can you?

A. You mean that they could be included in other amounts—I don't—

Q. Strike the question, Mr. Reporter.

A. I don't—

Q. As I understood your testimony yesterday, those items on Schedule 4, which are indicated as being transfers to the personal account from the vault, the source of which were otherwise unidentifiable—

A. That's right.

Q. —can you state positively that those items indicated on Schedule 4 as transfers to personal account could not include receipts of bond interest and dividends and therefore in effect never came from the vault?

A. The items in Schedule 4 as going—you're talking about—no—Item 4, the withdrawals—do

(Testimony of Roland Hellman.)

you mean [1038] as an addition to the vault or as a withdrawal from the vault?

Q. As a withdrawal.

A. Well, why would he withdraw the money from the vault? We're talking about money received; we are talking about dividends and interest received, and now you're talking about withdrawals from the vault. Why would he withdraw it?

Q. I will ask the question, Mr. Hellman. I will pose it again. As you testified yesterday and have repeated this morning, Schedule 4 contains a number of items shown as transfers from the vault, cash going from the vault into his personal account.

A. That's right.

Q. That is based upon the assumption that the money must have come from that source because it could not otherwise be identified, is that correct?

A. Yes.

Q. You have testified this morning that you could not identify the sums received by the taxpayer by way of interest on bonds and dividends as specific items going into the personal account, is that correct? A. That's right.

Q. Therefore the question I put to you is this, can you state that the item shown as transfers to the personal account from the vault in Schedule 4 do not include interest [1039] received or dividends received by the taxpayer in the years 1945 and 1946?

A. When you say transfers from the vault—
Mr. Drewes: Your Honor—

(Testimony of Roland Hellman.)

The Court: Yes, I think the question is clear.

Mr. Drewes: Would you read the question again, Mr. Reporter?

The Court: No. You heard the question. Did you hear the question?

A. Yes, I heard the question.

The Court: Well, he can answer it——

A. I can answer the question, your Honor. But not specifically yes or no.

The Court: Well, answer it and make an explanation.

A. If the money had been put in the vault and if you assume the money had gone into the vault, the cash box, and then he made a transfer to the personal account as described on Schedule 4, in that case it could be that those moneys would flow into the cash vault and into the personal account.

Q. (By Mr. Drewes): Mr. Hellman, I did not assume that the money had gone into the vault. My question was whether or not the money could not have gone—money which you have shown on Schedule 4 as coming out of the vault, could not in truth and in fact have included bond interest and [1040] dividends received by the taxpayer?

A. Coming out of the vault?

Q. Not coming out of the vault.

Would you read the question again, Mr. Reporter, the original question?

(Testimony of Roland Hellman.)

(Thereupon the question: "Q. Therefore the question I put to you is this, can you state that the item shown as transfers to the personal account from the vault in Schedule 4 do not include interest received or dividends received by the taxpayer in the years 1945 and 1946," was read by the Reporter.)

A. With reference to the withdrawals indicated on Schedule 4 from the safe deposit box, if proceeds of bond interest or stock dividends had been put into the safe deposit box, then the withdrawals could represent—coming out of the safe deposit box—could be considered as being from that source.

Mr. Drewes: That still is not responsive to my question, Mr. Hellman.

A. I think you better rephrase your question. Maybe I don't understand it.

Q. The items of which there are very many on Schedule 4—

A. Yes.

Q. Which are designated as being transfers of cash from [1041] the vault to the defendant's personal account, are the items which were shown as being deposited in that personal account which you have testified you could not otherwise identify—

A. Yes.

Q. —is that correct? A. Yes.

Q. Secondly, you have testified this morning that you could not positively identify the deposit of bond interest and dividends received by the defendant in

(Testimony of Roland Hellman.)

'45 and '46 as having gone into his personal account, is that correct? A. Yes.

Q. Can you state that the items shown as transfers to the personal account in Schedule 4 do not include bond interest and dividends received by the taxpayer?

A. Schedule 4—I think my answer covers that, because Schedule 4 is a reconstruction of withdrawals from the safe deposit box, and where we show—as an example, on Schedule 4, as an illustration, one of the first—let's take the first item on Schedule 4, "Transfer to personal bank account, \$100." As I understand your question, you are asking me if that \$100 instead of coming out of the safe deposit box and going into the personal bank account could have originated from dividends or interest and gone into the personal bank account?

Q. That's correct. The \$100 as well as the—the \$100, which is the first such item on Schedule 4, transfer to [1042] personal bank account, that represents an unexplained deposit in personal account, does it not? A. That's correct.

Q. Could you state that that is bond interest, as an assumption—we are speaking now of the \$100, as an illustration—and the \$400 or the \$1,500?

A. You could on the assumption, but the reason I didn't assume that was because the majority of the cases the bond interest and dividends—dividends particularly—bond interest, if they are coupons, might be cashed at the bank—it would have—

(Testimony of Roland Hellman.)

they would come from a bank and you would, therefore, have a bank number on it, and where I saw deposits in the personal account indicating bank numbers, I didn't take into any consideration that they would have any effect on the cash in the vault.

Q. If, for example, there was a cash deposit such as that shown on June 17th, the \$1,500 in the personal account——

A. June 17th——

Q. June 17th, the third——

A. On Schedule 4? I see it, the \$1,500. That's a cash deposit——

Q. A cash deposit in the personal account of the taxpayer, is that correct?

A. That is correct.

Q. Do you have any way whatsoever of telling, ascertaining, [1043] determining that that does not include hypothetically \$500 in bond interest received directly by the taxpayer and thus never came out of the vault?

A. No. But there are——The fact that it was actually cash would indicate that it was, as I stated before, that generally you would receive a check. Unless he cashed the check and then converted it into cash and deposited it. If you assume that much, why, it could be possibly, yes.

Q. State if you know how the bond interest is received by the owner thereof on treasury bonds?

A. I believe he has coupons which he clips, cashes. That could be in cash——interest on those bonds could be in cash.

(Testimony of Roland Hellman.)

Q. The coupons are cashed, are they not, in the normal course of events?

A. They can be converted into cash at the bank, yes.

Q. The United States Government pays its dividends on the bonds of the type in question here by cash, isn't that correct?

A. Pays dividends on bonds?

Q. Interest on bonds. I beg your pardon.

A. Pays directly in cash?

Q. They cash—cash is paid for the coupons.

A. You take the coupons, clip the coupons, and take them to the bank and they will give you [1044] cash.

Q. Isn't that the normal procedure?

A. Yes, it is, yes, yes. But there is no bond coupon indicated, any \$1,500 item.

Q. Isn't it possible, Mr. Hellman, that—again this is hypothetical—that the \$1,500 deposit in personal account on June 17, 1944 might include cash received from coupons on Treasury bonds?

A. Yes, it is possible that it could.

Q. Mr. Hellman, you recall testimony in this trial concerning the Riverdale Ranch?

A. Yes, I remember some of it. Most of it, I believe.

Q. Do you recall the testimony to the effect the ranch was sold for \$20,000? A. Yes.

Q. And do you recall the testimony that the taxpayer owned a one-sixth interest in that ranch?

A. Yes.

(Testimony of Roland Hellman.)

Q. Have you determined what disposition was made by the taxpayer of the proceeds from the sale of that ranch? A. Yes.

Q. Will you state what disposition was made?

A. May I have the partnership return?

Q. Yes. I hand you defendant's Exhibit Q. Is that the exhibit to which you refer?

A. This is the California return. I presume it is [1045] identical with the Federal.

Q. That will do.

A. Well, this is the ——. No, I wouldn't have accounted for this, because Mr. Olender's statement to me was that any income or profit derived was received shortly after the close of the year. This is the year 1946 and that would be received in '47 and therefore not pertinent to the case at hand.

Q. In any event, Mr. Hellman, I ask you to state, if you could, what disposition the taxpayer made of his share of the proceeds?

A. I didn't inquire as to what he did in '47.

Q. The record shows, I believe, Mr. Hellman, that the property was sold early in the year 1946.

A. Therefore I should have treated it in the '46 cash analysis?

Q. Mr. Hellman, I am simply asking you if you determined what disposition the taxpayer made of those proceeds.

A. They were assumed to have been—came through in '47 and I didn't go any further than that.

(Testimony of Roland Hellman.)

Q. I am going to show you a document, Mr. Hellman, which is entitled "Escrow statement of Mollie Olender, et al, in account with Home Title Company." It is dated January 29, 1946. I ask you if you have seen that document?

A. I have not previously seen the [1046] document.

Q. What was your answer? A. No.

Q. You have not previously seen it. Did you have any conversation with Mr. Olender concerning the sale of that property?

A. No, I didn't. This apparently didn't appear to be in issue at the time and my work on this case was principally involved in items primarily outside of the stipulation and in items that were in apparent dispute and we didn't go into that phase of it. Any work that I did. I did not make a complete audit of the whole years, of all the years.

Q. Do you recall, Mr. Hellman, testimony that you gave earlier in the trial concerning possible amount of capital gain and tax thereon on the sale of the Riverdale Ranch?

A. That was yesterday. I told Mr. Shelton I made an error in the computation, that I recomputed it.

Q. Do you remember my showing you Government Exhibit No. 2, which is the taxpayer's return for '46, and calling your attention to the Wilson Avenue property sale in the same year?

A. Yes.

Q. Following your testimony with respect to

(Testimony of Roland Hellman.)

those transactions did you make an examination of the taxpayer's books to determine the disposition of the proceeds from the sale of one of those properties? [1047]

A. That is not taken into account on my Schedule 4, no.

Q. You know as a fact, do you not, Mr. Hellman, that the defendant received in excess of \$3,000 as his share of the proceeds of the sale of that Riverdale Ranch in 1946?

A. I do not know that he received it in cash, but that he was entitled to that amount based on the reported sale. Whether it was actually distributed by the partnership, I have no direct knowledge.

Q. And you made no effort to determine whether he had received anything from the sale of that property, the disposition thereof?

A. The answer is the same on the partnership transaction, that it was not traced down to determine when he received that cash. Assuming that it came in '47, inasmuch as he stated he received his partnership income the following year, I didn't attempt to locate what happened to the income that was reported on the '46 return.

Q. We are dealing here not with proceeds in the form of income—

A. That's right—excuse me.

Q. —but the inclusion of the sale of the property.

(Testimony of Roland Hellman.)

A. The Wilson Avenue property, that's right. No, no, that was not determined where the proceeds from that sale went, whether they went into the bank or cash. Wait a minute. Yes, I was—the Wilson Avenue property is taken into [1048] account here. We have a deposit in Mr. Olender's personal bank account, May 29, 1946, of \$2,659.66, which is the remainder of the total amount received of \$5,659.66, which Mr. Olender testified was the total amount received, and \$3,000 of that went into his wife's account. We have taken that into consideration in our——

Q. What was the source of those particular receipts?

A. The bank deposit ticket of May 29, 1946, indicated a deposit of \$2,659.66.

Q. To what were you able to trace that, Mr. Hellman?

A. That plus the \$3,000 deposit in his wife's savings account on the same date there above, and the information that that was the sale price reported on the tax return—that is the amount that he received.

Q. From what, Mr. Hellman?

A. From the sale of the Wilson Avenue property.

Q. What about the sale of the Riverdale Ranch?

A. That was through the partnership and, as explained before, that was not taken into account in '46.

(Testimony of Roland Hellman.)

Q. Then your schedules 3, 4 and 3-A are inaccurate to the extent that they do not account for the receipt of the taxpayer's interest from the sale of the Riverdale Ranch; is that correct?

A. I don't believe the other computations take that into account either, Mr. Drewes. But to that extent, yes, it is. [1049]

Q. In the interests of time, Mr. Hellman,—. You have your Schedule 4 in front of you?

A. Yes. I have, yes.

Q. I have asked you a number of questions. You have answered them, with respect to the withdrawals of \$100, \$400, and \$1,500, on June 16, 22, and 27, respectively.

Now if I asked you the same questions with respect to the following withdrawals, would your answers be the same?

July 17, transfer to Olender-Elkus account, \$1,500.

August 24, transfer to personal bank account, \$300.

June 9, 1945, transfer to personal account, \$500.

August 27, transfer to personal account, \$522.

November 20, transfer to personal account, \$10,000.

May 1, 1946, transfer to personal account, \$6,000.

May 2nd, transfer to Olender-Elkus bank account, \$1,700.

July 20, transfer to personal bank account, \$570.38.

(Testimony of Roland Hellman.)

September 28, transfer to Olender-Elkus bank account, \$2,500.

September 23, transfer to personal bank account, \$1,500.

November 25, transfer to personal bank account, \$6,000.

December 4, transfer to personal bank account, \$2,800.

December 20, transfer to personal bank account, \$1,500.

A. No.

Q. State in what respect it would not?

A. Because it could not be that many items coming from [1050] the source that you indicated going into the personal bank account.

Q. Would you explain that, Mr. Hellman? I don't understand you.

A. You asked me the question if my answer would be the same as to the question on the first three items on there, if it would be the same in regard to all of these, and I say, no, because there could not be that much money on these large amounts. Some of these smaller amounts, it might represent interest or dividend payments. But you very seldom have a payment over two or three hundred dollars, and you certainly could not include these large items here as dividends or interest. In part—if there was two or three hundred dollars as part of the \$1,500 item, yes, but not the entire items, no.

(Testimony of Roland Hellman.)

Q. Well, the small items of dividend and interest—they are relatively small—they could be included in the larger items.

A. Yes, but these items that we are talking about here—

Q. Then with that qualification, would your answer be the same?

A. That there could be those minor amounts included in those items that we show as transfer from the safety box, could in effect have been receipts from dividends or interest. [1051]

Q. To be sure we understand each other, with the qualification which you have made, would the questions which I propounded to you and the answers which you gave in connection with the first three items, June 16, 22, and 27, be the same with respect to the other such transfers that I have read into the record?

A. In any amounts that may be deemed to be interest or dividends, they could be included in there, yes.

Q. It is important, Mr. Hellman, that—strike that. I am trying simply to save time here, and it is important that the record that is being taken down reflects precisely what we are doing here. I want to be sure there is no misunderstanding. I asked you if with the exception of the qualification as to the interest, dividends going into these larger amounts which you have explained, would your answers to the questions that I propounded to you

(Testimony of Roland Hellman.)

in connection with those first three items already indicated in the record be the same with respect—

A. I gave the answer previously. That will save some time.

Q. Is your answer “Yes”—with that qualification?

A. Only with the qualification. I will not say “yes” alone. Your question has too many intricacies in it. There are too many assumptions, and so forth, to answer that yes or no. [1052]

Q. Is your answer “Yes” with the qualifications which you put yourself in the record?

A. As I put myself in the record, the answer could be “yes.”

Q. Mr. Hellman, again in the interests of precision here, one of my associates has just indicated that you may have misunderstood my questions that I have just asked of you. I am not referring only to the matter of interest and dividends. My question was with respect to all of the questions which I have asked you concerning the first three transfers to personal bank account, if I asked you the same questions with respect to the other transfers that I have indicated would your answers be the same, with the qualification, any qualification that you have made?

A. I would want a specific question on each item. I cannot answer that.

Mr. Drewes: Would your Honor indulge me just a moment? I am trying to work out a way of

(Testimony of Roland Hellman.)

speeding this up so that I won't have to go through this extensive questioning into each one of the similar items.

The Court: Take the morning recess. That will give you a chance to collate your material.

Same admonition, ladies and gentlemen.

(Short recess.)

The Witness: Mr. Drewes, I refreshed my memory on one [1053] of the questions you asked me that I couldn't answer. I have some documentary evidence in respect to the answer. May I give it to you at this time? The question regarding the disposition of the proceeds from the Riverdale sale in Fresno in January, on which you showed me the escrow statement—

Q. Yes.

A. I might further explain that, as I stated I believe yesterday, that in working on this I worked with Mr. Lieberman, who had previously worked on it, and certain items that were already satisfactorily explained were not gone into by me. Therefore, certain of these items, if my memory isn't too good on them, is because I didn't actually go into them, considering that they had already been satisfactorily accounted for, and of which this is one of the items.

In the journal entry of Mr. Olender, on his books, of the Army & Navy Store, under date of April 2, 1946, is an item, "Debiting loans payable, reducing loans payable, and crediting M. Olender's

(Testimony of Roland Hellman.)

capital account in the amount of \$3,000." The explanation: "From cash received from Riverdale Ranch sale. M. O. Personal."

Now the loan payable reduced was that of his mother Mollie Olender, and Mr. Olender had told Mr. Lieberman that there was a letter from his mother referring to her keeping [1054] the money and it would apply against the amount that Mr. Olender owed his mother. Therefore that money never did come in in the form of cash.

Q. How much did he receive, do you recall?

A. He did not actually receive any cash. He just reduced, made an entry on his books reducing the amount he owed his mother by \$3,000.

Q. What was his share of the proceeds from the sale of the Riverdale Ranch?

A. I believe the escrow statement you showed me indicates it was thirty-three hundred something.

Q. \$3,319.29? A. That's correct.

Q. What disposition was made of the difference?

A. Apparently none. It was just that it was a personal matter between his mother and he, and he credited the loan by \$3,000. Actually he gave her \$3,300.

Mr. Drewes: May I ask that be stricken? I will withdraw the motion.

Q. Upon what evidence do you base your statement that he gave her \$3,319?

A. Upon the statement by Mr. Olender.

Q. In this trial?

(Testimony of Roland Hellman.)

A. I don't believe he made it in this trial. But I am explaining why this item was—did not appear on my Schedule [1055] 4. Because it was explained to me, and it appeared a very satisfactory explanation in the light of this type of a computation, and we accepted it.

Mr. Drewes: May I ask that the witness' answer be stricken as unsupported by the testimony in the trial?

The Court: The motion is denied.

Q. (By Mr. Drewes): To the extent that Schedule 4 does not reflect—Schedule 3 and 3-A and 4 do not reflect the disposition of the \$3,319.29, the schedule is incorrect, is that correct? A. No.

Q. Does not Schedule 4 purport to be a complete statement of all assets and disbursements of cash? A. No.

Q. To what extent is it not complete?

A. I explained previously that Schedule 4—To begin with, this specific item—I just finished saying that he never actually received any cash; it never went through his cash—Schedule 4—never went through his account, cash account. I explained yesterday that Schedule 4 was an attempt by us to reconstruct in some detail, far greater than Mr. Ringo did, to arrive at a possible balance of cash on hand. The original figures were so inaccurate that we determined it was necessary to attempt to reconstruct the cash balance, and we have gone to certain exhaustive [1056] lengths to

(Testimony of Roland Hellman.)

run these items down and come up with a certain balance.

We might not have gotten every item. We do not know that we do perfect work and can find everything. During the trial we saw last week, we found three or four items, and we had to revise Schedule 4 because items came up that we had no previous knowledge of or we did not run into it.

Q. You testified that you knew of this item, the receipt of the Riverdale property—

A. Yes, sir.

Q. —and that you discussed it with Mr. Olander and he told you that the money had been turned over to his mother, is that correct?

A. At the time I was making my analysis of the cash with Mr. Lieberman. He had already had an explanation on that item and it was in the books. We therefore did not pursue it at that time any further.

Q. Mr. Hellman, wouldn't sound accounting practice require that you account for the receipt of a disbursement if you knew of it, even though under your interpretation it would result in a wash entry, so to speak?

A. We are not making a detailed audit here, Mr. Drewes. Sound accounting practice would also require the Government agent examine those figures. They never took those into consideration.

Q. How do you know that?

A. Because they accepted the figures on Ringo's

(Testimony of Roland Hellman.)

sheet and they were not taken into consideration. They merely took some round figures that were put on a question and answer sheet at the end of the year and determined those to be the cash on hand. That's not a comprehensive audit.

Q. You have testified that there is an entry in the books of the taxpayer reflecting the debit to loans payable and credit to capital account in the amount of \$3,000 with the explanation that referred to liquidation of part of a loan from the taxpayer's mother, is that correct? A. Yes.

Q. Who located that entry in the book?

A. You mean during the recess?

Q. Yes. Who pointed it out to you?

A. Mr. Lieberman and Mr. Olender together.

Q. Mr. Hellman, you will recall that in connection with three items on Schedule 4 shown as withdrawals in the amount of \$100, \$400 and \$1,500 on June 16, June 22nd and June 27th, respectively, I asked you if it were not possible that those receipts as reflected by the personal ledger account of the taxpayer could not have come from this unreported sales outside of the business as was the Goodman sale. I also asked you if it was not possible that those receipts could have come from unreported withdrawals of cash from the [1058] business. I asked you if those receipts could not have been redeposits of sums which were withdrawn from that or other bank accounts at an earlier date. I asked you if they could not have been derived from dividends and interest received by the tax-

(Testimony of Roland Hellman.)

payer. And I asked you if they could not have been received as a result of sale by the taxpayer of other assets.

You replied that they could.

A. To all of those things with the assumption that if there were such things. Based upon the documentary evidence or any evidence in this case, you can't make—you would have to be making an awful broad assumption that they would come from that source.

Q. In each case I asked you if it was not possible, they being unidentified receipts by your own testimony.

Mr. Lewis: Your Honor, I am going to object to one part of his question, and that is "unreported sales" because when I asked Mr. Whiteside, the only transaction he said that he could find was the Goodman transaction, and he found no evidence of any other.

The Court: The objection is overruled, Mr. Lewis. This question is——

Mr. Lewis: It is hypothetical.

The Court: It is purely hypothetical, and I think the jury understands that that is based upon hypothesis and it [1059] may or may not be that any of the supporting data or supporting income may or may not be present in the records. It is purely a hypothetical question. The jury understands that. The Court likewise understands it.

Q. (By Mr. Drewes): You testified that that was so, it was possible. Now, on Schedule 4 there

(Testimony of Roland Hellman.)

are a number of other similar items, on other dates, showing transfers from the vault to the personal account. They are as follows:

August 24, 1944, \$300.

June 9, 1945, \$500.

August 27, 1945, \$522.

May 1, 1946, \$6,000.

July 10, 1946, \$570.38.

September 23, 1946, \$1500.

November 25, 1946, \$600.

December 4, 1946, \$2800.

December 20, 1946, \$1500.

Now, if I asked you the same questions with respect to those items, would your answers be the same?

A. Upon the assumption that there was such unreported transactions, or from those sources it could be that those items going into the personal bank account would have stemmed from that source rather than out of the vault.

Q. Now, keeping in mind, Mr. Hellman, the questions which were asked of you and which I have just repeated, I call your [1060] attention to Schedule 4, particularly with respect to item shown on July 17th, "Transfer to Olender-Elkus account," in the amount of \$1500; the item on May 2, 1946, "Transfer to Olender-Elkus account" in the amount of \$1700; and the item of September 18, 1946, in the amount of \$2500, "Transfer to Olender-Elkus account."

(Testimony of Roland Hellman.)

If I asked you the same questions with respect to those items would your answers be the same?

A. As to if they came from some other source?

Q. If it is possible they could have come from the sources enumerated?

A. Disregarding the evidence in this case and making those assumptions, it could, yes.

Mr. Drewes: May I ask your Honor that the witness' statement, "disregarding the testimony in the case," be stricken?

The Court: Yes, that may go out. It is a hypothetical question. I think the witness understands it.

Q. (By Mr. Drewes): And finally with respect to the item appearing on Schedule 4 under the date of May 1st, "Transfer to Olender-McGrete bank account" in the amount of \$5,000, if I asked you the same questions with respect to that transfer, would your answers be the same, Mr. Hellman?

A. On that assumption, yes.

Q. Mr. Hellman, do you have Exhibit 25 for identification? [1061]

A. No, I don't have.

Mr. Hagerty: Here it is.

Mr. Drewes: Thank you, M. Hagerty.

Q. Mr. Hellman, referring to Schedule 4, I call your attention particularly to three additions:

July 5, 1944, "Gift from mother Mollie Olender," in the amount of \$2500.

December 15, "Gift from mother Mollie Olender," \$1000.

(Testimony of Roland Hellman.)

January 2nd, 1945, "Gift from mother Mollie Olender," \$3,000.

Upon what evidence in the case do you base those particular additions to cash?

A. On the testimony of Mr. Olender.

Q. And upon any other source?

A. Reference was, I believe, made to Exhibit 7, Schedule A, of Exhibit 25 marked for identification.

Q. I show you Exhibit 25 for identification, particular reference to Exhibit 7, Schedule A, entitled "Withdrawals from savings account in Fresno," and listing six dates and corresponding amounts, and ask you if you relied upon that schedule?

A. No, we did not rely upon this schedule entirely. Although it was the original source indicating that a gift was made.

Q. Did you verify those transactions, Mr. Hellman? [1062]

A. The withdrawals from the savings account in Fresno?

Q. Yes.

A. Only to the extent of looking at the withdrawals from the pass book of his mother and therein indicating that withdrawals had been made, and Mr. Olender's statements to Mr. Lieberman and myself that at the time he withdrew from the bank in Fresno—at the time his mother withdrew from the bank in Fresno to make gifts to his sister, that he also received gifts on or about the same date in the form of cash or cashier's checks.

(Testimony of Roland Hellman.)

Inasmuch as the sister's account was at the Fresno Bank, a transfer was made into her account. But there was no transfer made to his savings account, that that came up to him in Oakland.

Q. Did you verify the transactions on the books of the banks in Fresno?

A. Do you mean to go there or check with them to see about these withdrawals?

Q. That's right.

A. No. We just had the passbook and the statements of Mr. Olender and—Mr. Lieberman and myself.

Q. Did you testify that you examined the passbook? A. Of Mrs. Olender?

Q. Yes. A. The savings passbook?

Q. Yes. [1063] A. Yes.

Q. Where did you get that?

A. From Mr. Olender.

Q. Did he have it in his possession?

A. Yes, sir, he did.

Q. And are there withdrawals reflected in the passbook in the amounts and dates as testified by Mr. Olender?

A. Do you mean as testified in court here as to the dates of withdrawals?

Q. Yes.

A. There are corresponding amounts of withdrawals.

Q. Did you check to see whether there were withdrawals on the passbook of Mollie Olender

(Testimony of Roland Hellman.)

corresponding to the dates and amounts shown on Exhibit 7—— A. Schedule A——

Q. Schedule 7 of Government Exhibit 25 for identification.

A. Only the four—the three on the last part of the schedule. The ones prior to May 4, 1944, which was the date we started to trace the cash from, we did not consider the prior three withdrawals—only the ones after July 5, 1944, and December 15 and January 2 of 1945.

Q. I am going to show you now the Government's Exhibit No. 52, consisting of copies of the bank records of the Bank of America at Fresno which were introduced into evidence yesterday, and ask you if you have examined them? [1064]

A. When the originals were presented in evidence yesterday I was sitting at the table and I glanced through them but I didn't examine every one of them, no.

Q. Have you examined them since that time?

A. Not in detail, no.

Q. Calling your attention to the item December 15, "Gift from mother Mollie Olender, \$1000"——

A. Are you referring to Schedule 4 now?

Q. I am referring to Schedule 4. A. Yes.

Q. What disposition of that \$1000 was indicated by the records of the Bank of America?

A. I don't see any relation other than——

Q. Mr. Hellman, didn't you examine the records, the exhibit which is in front of you, in great detail after it was put in evidence? A. This?

(Testimony of Roland Hellman.)

Q. The records of the Bank of America.

A. These here?

Q. That are in front of you, yes.

A. Yes. No, I examined them yesterday when they were put in evidence.

Q. Yes. A. During the recess, yes.

Q. And did you examine them very carefully to see whether [1065] or not the alleged gifts of the taxpayer were or were not supported by those bank records which are in front of you?

A. Supported to what extent?

Q. I will rephrase the question. After that exhibit was put into evidence, the bank records of the Bank of America in Fresno pertaining to the Olender accounts there, did you not examine them very carefully to determine whether or not the defendant's contention that he received gifts from his mother, a gift from his mother on December 15, 1944, was or was not substantiated by the transactions as reflected in those records?

A. Well, there's a lot of records here. Specifically what records?

Q. Did you examine those records to determine whether or not there was a withdrawal from Mollie Olender's account in the amount of \$1000 on December 15?

A. I checked that and, of course, that was in agreement with the passbook that Mr. Olender already had.

Q. And there was——

A. I had known that already.

(Testimony of Roland Hellman.)

Q. There was such a withdrawal?

A. Yes, \$1000.

Q. And then did you check those records to find out what happened to that \$1000?

A. (No response.) [1066]

Q. Mr. Hellman, you heard Mr. McNab testify the \$1000 withdrawn on December 15 was deposited in Mrs. Olender's commercial account on the same date supported by withdrawal slip and deposit slip, and that thereafter the money was not withdrawn; did you hear that testimony?

A. I did. I believe so, yes.

Q. Did you check those records to see whether that was accurate or not?

A. I don't recall checking for that specific purpose.

Q. You heard Mr. McNab testify that on January 2, 1945, there was a withdrawal from Mollie Olender's account in the amount of \$3,000; that on the same date \$3,000 was deposited in Terrys Olender's savings account; and that thereafter no withdrawals were made from that account; you remember that testimony?

A. I heard that testimony. Whether that is the exact wording—I presume you are reading from the record.

Q. Did you examine the records which are in front of you to determine whether or not the records so reflect?

A. Not after his testimony, no.

Q. I will hand you the Government's Exhibit

(Testimony of Roland Hellman.)

No. 53, Mr. Hellman, which was put into evidence yesterday and identified as the records of the Security First National Bank, Fresno. I will ask you if you heard the witness testify that on July 5, 1944, the records reflect a withdrawal from [1067] Mollie Olender's savings account in the amount of \$2500 but that the disposition thereof could not be determined because the withdrawal slips could not be located; did you hear that testimony?

A. Yes, I recall that.

Q. Did you check those records to see whether or not that was the case?

A. Check these records?

Q. Yes. A. No, I didn't even see these.

Q. To the extent that those records support—strike that. Assuming that those records reflect the transactions as I have related them to you, would you change Schedule 4 by deleting the three items "Gifts from mother" which I have referred to?

A. My answer previously to you was that I was not considering these as the source of the gifts, the money coming out of Mrs. Olender's bank accounts.

Q. The source of the gifts was Mr. Olender's testimony, that that is where he got it, is that correct?

A. Not entirely. Mr. Olender's statement was that he got them from his mother.

Q. That is right. A. That's right.

Q. Yes? A. That's right, yes. [1068]

Q. And he testified that he got them out of her

(Testimony of Roland Hellman.)

—he got the money out of her accounts in Fresno on the dates and in the amounts shown on Government's No. 25 for identification, is that correct?

A. I do not know. I would have to see the transcript to tell you for sure if he said that.

Q. Weren't you in court, Mr. Hellman, when I showed No. 25 for identification to Mr. Olender and asked him as to each withdrawal, whether on that date he received the sum shown from his mother as a gift which she had gotten from her accounts in Fresno; do you remember that testimony?

A. I can't remember the specific testimony, no.

Q. For purposes of refreshing your recollection, Mr. Hellman, I want to read from the transcript the testimony in this trial, beginning at page 456.

Mr. Hagerty: What volume is that?

Mr. Drewes: Page 456, in Volume 7. Beginning at line 6 on that page:

“Q. I show you, Mr. Olender, Government's Exhibit No. 24 for identification, particularly with respect to Exhibit 7, Schedule A.”

I take it that is an error. It is No. 25 for identification.

“You testified this morning, Mr. Olender, that that schedule represents gifts from your mother to yourself, is that correct? [1069] A. Yes, sir.

“Q. And I note that the schedule is entitled ‘Withdrawals from savings accounts in Fresno.’

“What is meant by that, Mr. Olender?

“A. That is where the funds came from.

“Q. From what savings accounts in Fresno?

(Testimony of Roland Hellman.)

“A. She had two savings accounts in Fresno.

“Q. Where were they?

“A. One in the Bank of America, one in the Security First National Bank.

“Q. And where, for example, in the first item where the date is shown as February 3, 1942, and the amount of \$1,000, does that mean that there was a withdrawal from one or the other of those two banks on that date? A. Yes.

“Q. And in that amount? A. Yes.

“Q. And on March 31, 1943, your mother withdrew \$1,000 as a gift to you? A. Yes.

“Q. And withdrew it from one or the other of those two banks? A. Yes.

“Q. Similarly on January 6, 1944, she withdrew \$2,000 from one or the other of those two [1070] accounts and gave it to you? A. Yes, sir.

“Q. What disposition did you make of those funds, if you recall?

“A. Some of it I put in my safe deposit box, some I used in other ways.

“Q. Well now, you state that you put it in your safe deposit vault. In what form?

“A. Currency.

“Q. She made the withdrawal and gave it to you in currency? A. Yes.

“Q. On July 5, 1944, did she withdraw \$2500 from either one of those two accounts and give it to you? A. It says so in there.

“Q. Was that true? A. Yes.

(Testimony of Roland Hellman.)

“Q. And on December 5, 1944, she withdrew \$1000? A. December 15.

“Q. I beg your pardon, you are correct.

“A. Yes.

“Q. And on January 2, 1945, she withdrew \$3,000 from either one of those two accounts and gave it to you in currency? [1071]

“A. Yes, sir.

“Q. And you put it in your safe deposit vault or made some——

“A. I don't know where I put it. I put it somewhere.”

Do you recall that testimony, Mr. Hellman?

A. What is the date on that?

Mr. Hagerty: If your Honor please, in addition to that, the testimony on page 459, the answer to the question should be added to that, the beginning of line 4. The question, well, it really begins on the bottom of page——

Mr. Drewes: Well then, let me read the rest of it. I will continue it from that point.

Mr. Hagerty: All right.

Mr. Drewes: The last answer:

“A. I don't know where I put it. I put it somewhere.

“Q. Other than your safe deposit vault where would you have put it?

“A. I might have deposited it in one of my accounts, I am not sure.

“Q. Would your bank records show deposits of those sums as of any of those dates?

(Testimony of Roland Hellman.)

“A. They may or may not, I don’t know.

“Q. You could examine your records for us, couldn’t you, and let us know?

“A. Yes, I could. I haven’t. [1072]

“Q. But there is no question in your mind with respect to Exhibit 7 which is in front of you as to each one of those amounts your mother withdrew that sum from either one of the two banks which you have designated on the dates shown and gave the money to you in cash?

“A. I am not positive that the money came out of those banks was given to me. She may have taken money those same dates from some other place, but she definitely withdrew that amount of money on those dates either from the bank or some other bank and gave the money to me. But there are positive withdrawals on that date, and I checked with my mother to make sure they are correct.

“Q. There are positive withdrawals on each one of those dates? A. Yes.

“Q. And the money was given to you?

“A. Yes.

Mr. Hagerty: That is as far as I meant. In other words, that answer on line 4.

Q. (By Mr. Drewes): Mr. Hellman, do you recall that testimony?

A. I don’t know if I was in Court that day. What is the date of that testimony? I read the transcript but I might not have gathered all that from reading it hurriedly. [1073]

Q. Tuesday, September 23.

(Testimony of Roland Hellman.)

A. No, I wasn't in Court that day.

Q. It was the afternoon session. You were not in Court? A. I don't believe I was.

Q. Did you read the transcript?

A. Yes, I read the transcript.

Q. You also heard the testimony of the bankers with respect to the disposition of those funds as reflected by the records which are in front of you, have you not?

A. Showing the withdrawals and the deposits in her account?

Q. Yes. A. Yes.

Q. In the light of that testimony do you wish to change Schedule 4 to delete those gifts as having been received by the taxpayer? A. No.

Q. Why not?

A. I think my original answer to your question covered that.

Q. I don't recall it, Mr. Hellman. What was it?

A. To rephrase it, the dates indicated in Schedule 7 of the gifts from Mrs. J. Olender, mother, as I said in our preparation of Schedule 4, Mr. Olender was uncertain as to whether these were moneys coming out of the bank accounts [1074] or whether—just where the source, other than it came from the mother, was. But he said that always when his mother made a gift to him she made a gift to his sister at the same time. We did not attempt at that time to ascertain whether the withdrawals went into his sister's bank account or whether they came to him. But inasmuch as his statement was to that

(Testimony of Roland Hellman.)

effect, that his mother always made the gifts identical, generally speaking, he said, why, we took those dates as being the approximate time that he would have received money from his mother.

Q. When did he tell you that, Mr. Hellman?

A. Oh, I can't be certain of the time he told us. We were—during one of the conferences we had in preparation of this schedule.

Q. When did Mr. Olender first tell you that his mother had made duplicate gifts to his sister?

A. I don't remember the exact time, but he was going through—he has a big, a book showing some transactions of his mother, showing—and showing the gift, gifts made, being gifts to his sister and gifts to himself.

Q. In truth and in fact, Mr. Hellman, did not Mr. Olender first tell you that his mother made duplicate gifts to his sister at approximately the same time gifts were made to him yesterday afternoon after the witness from the bank testified that the withdrawal of \$3,000 on January 2nd, 1945, [1075] went into the account of Terrys Olender Gambor?

A. No.

Q. When did he tell you?

A. I can't remember the specific date. It was during our conferences. We have been working the last three weeks on this case.

Q. Did the taxpayer tell you—strike that. The Bank of America records, at the Fresno Branch, which you have in front of you, reflect a transfer of

(Testimony of Roland Hellman.)

\$3,000 January 2nd from the savings account of Mollie Olender into the savings account of Terrys Olender Gambor. Do they reflect a similar withdrawal in a similar amount on that date?

A. January 2nd of what year?

Q. In other words, are there two \$3,000 withdrawals?

Mr. Hagerty: I will object to that, your Honor. The exhibit is the best evidence of what it demonstrates, what it portrays. The record itself has been covered in this matter thoroughly all the way. It is obvious there is no other withdrawal in that particular account. It was so testified by the men who brought in the accounts, that they didn't know what other affairs she had or went on with—what other cash transactions. I think the matter has been fully rehashed already, your Honor.

Mr. Drewes: We are just starting, Mr. Hagerty. I believe, your Honor, that the jury is entitled to know what [1076] the records reflect.

A. Can I have—can you refer me to the account number so I will know which of the records to look at?

Mr. Drewes: Account No. 3941, as I recall it, is the savings account of Mollie Olender.

A. And the date of withdrawal was—which date?

Q. January 2nd, 1945. A. \$3,000.

Q. Is there another \$3,000 withdrawal on the same date? A. On the same date?

Q. On that date. A. No. No.

(Testimony of Roland Hellman.)

Q. Is there a \$3,000 withdrawal on any date approximate thereto? A. In this account?

Q. Yes.

A. No. The next item of transaction occurred in May of a \$1000.

Q. Does the record which you have in front of you, account No. 3941, reflect a withdrawal of a thousand dollars on December 15, 1944?

A. Yes.

Q. Is it one or are there more than one \$1000 withdrawals? A. On December 15?

Q. Yes. [1077]

A. No, only one withdrawal of \$1000.

Q. Now will you examine the records and tell me if that \$1000 did not go into the commercial account of Mollie Olender?

A. (Witness examines records.)

Mr. Hagerty: If your Honor please, on direct examination of the defendant, there was offered the lease for the year 1951. We now have certain checks covering the period that is actually in question and the lease of that time, which I will proffer into evidence after Government counsel has had a chance to examine it.

The Court: All right.

A. I find the deposits to her personal account of a thousand dollars but I don't see—

Mr. Drewes: If your Honor please, it is five minutes to 12. I intend to question the witness as to several other similar items. Possibly if he were to examine the records thoroughly over the recess—

(Testimony of Roland Hellman.)

The Court: I suggest we resume at 2:30. In the meantime if counsel on both sides will collect the material as far as you are able, it might expedite the examination, and you have the lease now presented by counsel.

Mr. Drewes: Yes.

The Court: The lease with respect to the prior years. The last lease he presented was the 1951 lease. This refers [1078] to prior years. So that we may hasten the examination as much as possible.

We will resume at 2:30, ladies and gentlemen, with the same admonition to you.

(Thereupon an adjournment was taken until 2:30 o'clock p.m. this date.) [1079]

October 3rd, 1952, 2:30 P. M.

ROLAND HELLMAN

resumed the stand, and having been previously duly sworn, testified further as follows:

Cross-Examination

(Resumed)

By Mr. Drewes:

Q. Mr. Hellman, do the records before you show that the thousand dollars was deposited in Mrs. Olender's commercial account?

A. February 3, 1942, item of \$1000.

Q. No, December 15, 1944. I am still referring to Schedule 4.

A. Schedule 4——

Q. Schedule 4.

(Testimony of Roland Hellman.)

A. On Schedule 4, December 15, 1944, \$1000—yes.

Q. Gift from mother?

A. That's right, yes.

Q. The Bank of America records, which you have before you, reflect, do they not, that that sum was withdrawn from Account No. 3941 and deposited in the commercial account of Mrs. Olender?

A. Withdrawal from the savings account of Mrs. J. Olender and deposited to the commercial account of Mrs. J. Olender on December 15th, 1944, yes.

Q. And does the commercial account reflect any similar [1080] withdrawal on the same, approximately the same date?

A. Just a deposit on December 15th. There were no withdrawals of amounts like that for the next several months.

Q. Now, calling your attention to the item on Schedule 4, July 5, gift from mother, \$2500. You examined the records of the Security First National Bank which are in front of you?

A. I didn't bring up the Security's. I have the Bank of America. It's in that envelope on that table, I believe, Mr. Drewes.

Q. (Handing to witness.)

A. Yes, \$2500 we show on Schedule 4.

Q. It is true, is it not, that it is impossible to tell from those records, however, what disposition was

(Testimony of Roland Hellman.)

made of that \$2500, for the reasons the witness heretofore testified to, is that correct?

A. The record indicates a withdrawal of \$2500 on July 5, 1944, from the Security First National Bank. There is nothing to indicate where it went, no.

Q. You have the Government Exhibit No. 25 for identification in front of you?

A. No, I believe it is on the table there. I have a copy of it, which I have been working from. If you want me to work from that—I don't have the official exhibit.

Q. I have it here. I thought you had it. [1081]

A. I have a copy. It's the same thing, I believe.

Q. There is an entry there, is there not, showing that on January 6th, 1944, the sum of \$2,000 was received by the taxpayer as a gift from Mrs. Olender?

A. Yes, this Exhibit 7 refers to gifts from Mrs. J. Olender, mother.

Q. Do not the records which are in front of you, the Bank of America records, show that that sum was withdrawn from Account No. 3941 and deposited in Account No. 126 in the name of Terrys Olender Gambor?

A. Under date of January—there's two dates on here. One, January 4, one January 6, 1944, a withdrawal from savings account No. 3941 signed by Mollie Olender, "Transfer to"—something is scratched out and then written in ink afterward, "Savings account 126." Then there is a deposit

(Testimony of Roland Hellman.)

ticket for savings account 126 showing a transfer from savings account No. 3941 in the amount of \$2,000.

Q. The record which you have before you indicates that there had been no withdrawals whatsoever from Account No. 126 for the period in question, is that correct?

A. No withdrawals, no. Just deposits.

Q. The Government exhibit for identification No. 25 reflects—particularly with respect to what is called Exhibit 7—reflects next a gift from Mrs. Olender to the taxpayer on March 31, 1943, in the amount of \$1,000, does it [1082] not?

A. Yes.

Q. Do not the bank records which you have before you reflect that on that date the sum of \$1000 was taken from Account No. 3941 and deposited in the commercial account of Mrs. Olender?

A. \$1000 withdrawn on March 31, 1943, and a deposit to the commercial account on the same date of Mrs. J. Olender.

Q. Now the next item on Government Exhibit 25 for identification reflects that on February 3, 1942, a gift was made from Mrs. Olender to the taxpayer in the amount of \$1,000, does it not?

A. Yes.

Q. And do not the bank records which you have before you reflect that on February 3, 1942, the sum of \$1000 was taken from Account No. 3941 and deposited into Account 2146, which was another savings account of Mrs. Olender?

(Testimony of Roland Hellman.)

A. Yes, that's right.

Q. And does Account 3941 reflect a similar withdrawal at or near that date?

A. That was the February 3, 1942, item?

Q. Yes.

A. A deposit in here as of January 31, 1942. The ticket—

Q. But no matter. It was testified by Mr. McNab yesterday afternoon that is the fact. Do you so recall? [1083]

A. Just the difference in the dates from January 31 to February—the tickets of February—. The reason for that is—. But there is—there is no other withdrawal, other than the \$200 item on February 3 of '42, and no more that month.

Q. Will you put the exhibit together again, Mr. Hellman.

A. I don't know if I can get them back exactly the way they were.

Q. In the proper envelopes, I mean.

A. Oh, I see. Do you want to put the Security's down here on the bottom.

Q. Mr. Hellman, you prepared Schedule 4, as you have testified? A. That is correct.

Q. Now as a licensed public accountant, in view of the evidence which you have just examined, is it still your opinion that a gift from Mollie Olender in the amount of \$2500 on July 5, 1944, gift of \$1,000 on December 15, 1944, and the gift for \$3,000 on January 2, 1945, should remain in Schedule 4?

A. Yes.

(Testimony of Roland Hellman.)

Q. Has anything occurred to refresh your recollection, Mr. Hellman, as to when Mr. Olender first told you about duplicate gifts to his sister?

A. I believe it was the early part of last week when we [1084] were going over Schedule 4, at that time making up the schedule itself and revising, and the question came up as to how we could tell on the gifts, and prior to that time we had discussed these gifts—we had looked at Mr. Ringo's Exhibit 7, here, that we were just quoting from, and inasmuch as we found so many errors we couldn't take any of these figures to be correct, so we decided in these particular items Mr. Olender—Mr. Olender stated to us, to me, along with Mr. Lieberman as we were talking over the schedule, that he had received gifts from his mother totalling this amount of \$10,500. Now this Exhibit 4 doesn't purport to be, as far as the dates—the exact dates of the transfers—they could have occurred one day, a week or even a month at a different date—but it was in an attempt to reconstruct. Mr. Olender stated that he received this much in gifts, of which a portion of it would have come over a certain period of time——

Q. Let me interrupt——

A. We took his word for it and put it down on our schedule.

Q. Did you have this discussion with Mr. Olender before or after Mr. McNab testified yesterday?

A. I have answered you twice, Mr. Drewes, that I talked to him prior to yesterday.

Q. Did you have that discussion before or after

(Testimony of Roland Hellman.)

I examined Mr. Olender on Tuesday, September 23, concerning the gifts [1085] from his mother to which we are referring?

A. I couldn't be sure. I wasn't in Court on that day and I don't know whether it came that same day or before that. I couldn't be certain.

Q. Did you discuss his testimony in Court on that subject during this conversation to which you refer?

A. I don't know whether we discussed it being in the light of the testimony in that respect. I know we did discuss the gifts at that time during last week.

Q. Who was present at the discussion?

A. Mr. Olender, Mr. Lieberman, possibly Mr. Lewis. I don't know. Sometimes Mr. Lieberman, Mr. Lewis would leave the office or usually, though, inasmuch as Mr. Lieberman had done lots of prior work on this schedule or in his work on the case, he was much more familiar with the items and he was always in on the discussions.

Q. Where did this discussion take place, Mr. Hellman?

A. Well, most of our discussions either took place in Mr. Lewis' office, adjoining Mr. Lieberman's, and that adjoins mine. It could have been one of the three offices.

Q. Mr. Hellman, when did you first become aware of the fact that the Government had subpoenaed the records of Mrs. Olender on the Bank of America and the Security First National Bank of Fresno?

(Testimony of Roland Hellman.)

A. I suppose it was some time last week when the men from [1086] the bank were here. I wasn't sure what records they had subpoenaed. But it was known that they were from that bank. It was assumed that that was possibly—but I didn't know for a fact——

Q. It was assumed those were the bank records of Mrs. Olender?

A. Not necessarily Mrs. Olender, no. Just from the bank, Security First National Bank in Fresno. I don't believe we discussed any transactions on that bank that I can remember.

Q. Was the discussion had in the presence of the defendant, and with the defendant, to which you have testified? Strike that. Did the conversation with the defendant and in his presence, to which you have testified concerning duplicate gifts to himself and to his sister take place before or after you had learned that the Government had subpoenaed bank records in Fresno?

A. Well, my memory, if it serves me, the bank men from the bank were here, that was the first day last week, a week ago last Wednesday,—that was the first day I was in court, and I know we had talked about it actually before I had come into court. I don't think I knew of their presence until that day that I did come into court. So I would say we had discussed it prior to the time I knew about the men from Fresno, from the Fresno bank being here.

Q. You have testified, Mr. Hellman, that you

(Testimony of Roland Hellman.)

determined [1087] that you could not rely on the work done by Mr. Ringo.

A. Not entirely, no.

Q. You mean you did not testify entirely or you could not rely entirely?

A. Yes, I stated we found inaccuracies in Mr. Ringo's work and——

Q. You know that Mr. Ringo prepared Government's Exhibits 24 and 25 for identification, do you not? A. Yes.

Q. I call your attention to your Schedule 4, which you have testified was prepared by yourself. On July 5, on December 15, on December 16, and on January 2nd are items which are definitely keyed into the Ringo—strike that—definitely keyed into the Exhibits 24 and 25 for identification.

A. You mean the gift items, the additions?

Q. The gift items——

A. You didn't call the year and I didn't follow the dates that you were calling out. It was——

Q. I am referring to the three gift items.

A. Yes.

Q. The item on December 16, with reference to purchase of Treasury bonds. In each of those cases you will note that you referred to the Government Exhibit 25 for identification as the source of your information.

A. As a reference to it because that is the way the [1088] approximate times that we set forth this money, Mrs. Olender gifts, of having been received. There was no exact way to determine the date, and

(Testimony of Roland Hellman.)

inasmuch as his statement was that he received gifts the same time as his sister did, why, we just used the same dates.

Q. I am going to interrupt you because you didn't understand my question. If you did not find Exhibit 25 reliable as prepared by Mr. Ringo, why did you obviously rely thereon in connection with at least four of the entries included in Schedule 4?

A. I didn't rely entirely on this. I stated several times it was upon further discussion with Mr. Olender that those items were added onto the Schedule 4.

Q. Do you not on at least four occasions, Mr. Hellman, refer to Exhibit 25 as the source of evidence upon which Schedule 4 is predicated?

A. There I see three references to Exhibit 24—U. S. Exhibit 24, Exhibit 7, Schedule A.

Q. Didn't you testify that that work was unreliable?

A. As I stated, that was used as reference to this schedule here to be able to identify——

Q. Didn't you include those references on Schedule 4 for the purpose of reflecting the authority upon which you based the items that are referred to therein, wasn't that the purpose of putting—— [1089]

A. To identify the source or to relate to the instance, the time?

Q. To identify the evidence upon which you predicate the items to which it refers?

A. I couldn't because this was not—these items

(Testimony of Roland Hellman.)

were not actually able to be traced and there is no—we didn't actually use this—we did make reference to the schedule but only after it was discussed and the gifts from his mother being established. I didn't know for a fact—

Q. I am going to ask the question once more in another form and ask you to give me a direct answer, Mr. Hellman. I have called your attention to four specific items which appear on Schedule 4. With respect to each of those there is a reference to the Government Exhibit 24. Is that not true?

A. I only see three items.

Q. I call your attention to—

A. I see—wait a minute. I see—the purchase of bonds also.

Q. On December 16.

A. Yes, I see that.

Q. Each one of those contains a reference to the U. S. Exhibit No. 24, is that correct?

A. That's right, yes.

Q. Did you not include those references for the purpose of [1090] indicating the source upon which you relied in support of those particular items in Schedule 4? A. Merely as a reference.

Q. As a reference for what purpose, Mr. Hellman?

A. To associate the gifts received by Mr. Olander from his mother. This Schedule 7, this exhibit—as it is now, Exhibit 25 and not 24,—

Q. One of the items to which I refer has nothing to do with gifts. It refers to the purchase of \$8,000

(Testimony of Roland Hellman.)

in Treasury bonds. In each of those four items a reference is made to the Government Exhibit 24. Did you or did you not include those references for the purpose of indicating the source of evidence upon which you relied or depended in support of those items?

A. I did not depend entirely upon Schedule 25, no,—or Exhibit 25.

Q. You depended in part, did you not?

A. As a reference, yes.

Q. Now turning your attention, Mr. Hellman, to the item "Transfer to bank account," August 24, \$300,—do you see that?

A. On Schedule 4?

Q. Schedule 4.

A. "Transfer to personal bank account."

Q. \$300—do you have Schedule 4 before [1091] you?

A. Yes, I do. What date is that?

Q. August 24.

A. That's right, yes.

Q. Now in fact on that date there was a deposit to the taxpayer's personal account in the amount of \$332, isn't that correct?

A. That is the amount that was in cash. Now I will have to look at my schedule to see if it was the full amount of the deposit. (Examining document.)

No, the full amount of the deposit was \$727.50.

Q. How much of that was cash?

A. \$300—well, there's thirty-two—\$300—and there's 32 cents in coin.

Q. Why did you leave the 32 cents off?

(Testimony of Roland Hellman.)

A. Probably a mathematical error, which we all make sometimes.

Q. And now turning your attention in the same column to the next item, December 16, purchase of Treasury bonds, the amount of \$8,000. Upon what do you base that, Mr. Hellman?

A. It was originally indicated in the sources there that is mentioned, that that item—

Q. You saw the source mentioned—you mean Exhibit 24?

A. 24, yes. I have a revised sheet on that because there were some other errors on that sheet which—

Q. Some other errors on what sheet? [1092]

A. Exhibit 3 on page 1 of Exhibit 25. Those items—the store check of 19—the store check was issued for \$5000 on that particular purchase of bonds and there's another cash item of \$8,000, the \$13,000, I believe on that item there, inasmuch as the only dispute of the bonds was the question of the \$20,000 of the mother's bonds, and that had been the figure on there. There was no further attempt to actually determine that that was an erroneous figure. It tied in with the other bonds. We reconciled the purchase of the bonds and it was, with a few exceptions, in accordance with this Exhibit 3, and we used that figure of cash of \$8,000.

Q. How do you know that that \$8,000 came from the vault?

A. On Mr. Olender's testimony.

(Testimony of Roland Hellman.)

Q. You were not able to verify that in any way?

A. I think I stated the other day I wasn't in the vault when he took it out.

Q. You found no record of it?

A. There are no records of the ins and outs of the vault.

Q. The next item, Mr. Hellman, concerns the Barney transaction. I understand that you relied upon the cashier's checks which are in evidence and and upon the entry in the defendant's books, is that correct?

A. On the cashier's checks and upon the statement of Mr. Olender that he used money from the vault, cash, safe deposit [1093] box, to purchase those checks with.

Q. The purchases were also entered in the defendant's books, were they not? A. Yes.

Q. And when were the purchases made?

A. They were really made, I believe, in November. I think the December is in error on there. As a matter of fact, I am—If you will show me the book I can give you the exact—I thought it was a mistake in retyping this. I didn't think it was correct.

Q. In any event, it was either in November or December?

A. I am almost sure it was all in November.

Q. Do you recall when the entry was made reflecting those purchases in the defendant's books?

A. In the December purchase register.

Q. Mr. Hellman, there has been testimony with

(Testimony of Roland Hellman.)

respect to certain transactions with Money Back Smith. Do you recall that testimony?

A. Yes.

Q. Why have you not included the Money Back Smith transaction in Schedule 4?

A. This Schedule 4 starts as of May 5, 1944. The Money Back Smith transactions occurred prior to that date and it was testified that the cash was or the cash was paid prior to this date. Therefore, it would not have any effect [1094] on the ins or outs of the box since it occurred prior to May 5, 1944, date.

Q. How do you know it occurred prior to that date, Mr. Hellman?

A. Because the purchase register of the Army-Navy Store, principally in reliance of—

Q. Do you recall what the entries were? I will be glad to get the exhibit for you, if you don't remember?

A. Yes, I believe—You might give it to me. I am sure I can state it correctly. I am almost sure I can state what it is.

Q. I don't recall the number of the book. I see a purchase register indicated here. Do you have them all there, Mr. Hellman, or is there still another book?

A. No. The general journal and the purchase register are the two smaller books.

Q. The two smaller?

A. Yes, the two smaller ones than these.

Q. Here they are (handing to witness).

(Testimony of Roland Hellman.)

A. These items were entered in the purchase register along with the December invoices but they were dated February 8th and 3rd, 2nd, 24th, 24th, March 15, March 8, and March 2nd.

Q. You are reading from the entries in the purchase register, aren't you?

A. That's right. [1095]

Q. And the invoices bore those dates as reflected by the entries in the purchase register?

A. That's right.

Q. Have you seen the invoices?

A. From Money Back Smith?

Q. Yes.

A. No. No, they can't locate those invoices. We have been looking for them for weeks.

Q. Do you know why the entry was made in December, Mr. Hellman, although it was indicated the purchases were made—

A. I wouldn't have any personal knowledge. I believe the bookkeeper testified the other day—I don't think she actually knew either. I made an assumption why, but that's—

Q. Well, Mr. Hellman?

A. Inasmuch as these books—this was actually written by the bookkeeper back in 1944.

Q. She testified she didn't know either. Do you recall that?

A. Why they would misstate the date on the invoices, there is no particular reason to do it.

Q. You haven't seen the invoices?

A. No, no, I said I haven't.

(Testimony of Roland Hellman.)

Q. And you don't know whether they were paid for in cash or not, do you?

A. Other than through Mr. Olender's [1096] testimony.

Q. What was his testimony, to the best of your recollection?

A. And also the books indicate he paid for it by cash, which was put in the books eight years ago.

Q. Where does that appear?

A. That they were paid in cash?

Q. Yes.

A. Actually stated in cash, I don't believe. Yes, on, I believe, page 17 of the general journal, under date February 28, 1945, there is a debit to accounts payable for \$6903.02, and a credit to M. Olender investment account for \$6903.02, with an explanation: "To record cash payments covering purchases from Money Back Smith and Barney's Clothes Shop."

Q. Oh, that is the adjusting entry to which there has been testimony before, is it not?

A. That is the entry which the bookkeeper testified about as being a correction entry.

Q. But it cannot be determined exactly when the payments were made to Money Back Smith, isn't that correct?

A. The exact date could not be determined, no.

Q. You are relying on the books as they reflect the purchase date?

A. That's right.

(Testimony of Roland Hellman.)

Q. And assuming at that time payment was made on the purchase date?

A. Well, the purchase date or within thirty days, as was [1097] testified, that a lot of payments were made in cash. I believe Mr. Olender stated in this specific instance he had to send cash in advance.

Q. It is true, is it not, Mr. Hellman, you have assumed that all of the purchases made by Mr. Olender from Money Back Smith were paid for with cash?

A. I don't think it is an assumption. When something was written in the books five or seven years ago and that's their bookkeeping records—and they have been proven to be correct, except for one item—there is no reason to doubt them.

Q. Do you recall Mr. Olender's testimony as to the Money Back Smith purchases?

A. I wouldn't say in detail.

Q. Do you recall whether he testified that he had made all purchases in cash?

A. It is my recollection that he testified to that. You would have to read the transcript to be sure. I wouldn't state for sure.

Q. You have referred to a journal entry adjusting the Money Back Smith transaction by debiting purchases and crediting investment account. Was that correct?

A. Debiting——

Q. Was that a journal entry?

A. No, accounts payable, because when they were posted— [1098] when they were written up in the purchase register there was a debit to purchases

(Testimony of Roland Hellman.)

and a credit to accounts payable, and the reverse suggesting was to debit accounts payable and credit investment.

Q. What is the date of that entry?

A. The journal entry?

Q. Yes.

A. Under date of February 28, 1945.

Q. Wouldn't you assume, Mr. Hellman, that the cash payment had been made as of the date of that journal entry?

A. Not with the explanation that follows it, no, you would have to assume nothing because the journal entry fully describes—No, in this instance here, which is what I did too, was to trace back, trace this back——

Q. Why don't you read that entry?

A. I read it once. Would you like me to read it again?

Q. Yes, read it again.

A. (Reading): "February 28, 1945, debit accounts payable \$6903.02. Credit item Olender investment account \$6903.02. To record cash payment covering purchases from Money Back Smith and Barney's Clothes Shop."

Now we went—How that item was traced down, was to go back to the accounts payable register. To go back, and upon locating these items that we referred to before in the purchase register as of February and March, 1944, items, [1099] by adding those up, getting, taking the total of that, and then the total of the Barney's items, which are also men-

(Testimony of Roland Hellman.)

tioned in the journal entry, those items all in one group come to that exact figure.

Q. Is it not true that the journal entry is the only evidence you have as to date of payment of those invoices?

A. The journal entry doesn't evidence the date of payment, no.

Q. But it would be some indication of the date of payment, would it not?

A. No, the date of—indicating the payment, would be the date that the invoice was shown as on the purchase register. Now it's normal in most businesses bills are paid within thirty days, some of them for cash. If an invoice was dated on the books as of February, there is no reason to believe it wasn't February.

Q. Don't you recall when Mrs. Manger testified as to the reason that the entries were made in the purchase register in December, that she suggested that it might have been because the goods were being held for the purpose of returning them?

A. That could be.

Q. The entry was not made until December for that possible reason. If that was so, if that was so and then it was elected to keep the merchandise, the entries were made in [1100] the purchase register in December and the goods were thereupon paid for, that the item would have been—the whole transaction would have been consummated as a purchase and payment therefor in December of 1945.

(Testimony of Roland Hellman.)

A. I don't—I think I was a little bit—I didn't follow you.

Q. Let me restate it.

A. Rephrase it.

Q. The invoices state that the merchandise was purchased early in the year? A. '44, yes.

Q. '44. The bookkeeper testified that they were not—testified as a possible reason why they were not entered in the purchase register until December of that year was possibly because the merchandise might have been returned?

A. They intended to return it.

Q. Intended to return it? A. Yes.

Q. Now if that were assumed to be so and if it were then decided by Mr. Olender he would keep the goods, would it not follow that the entries would be made in the purchase register in December and the goods would be paid for at that time?

A. I don't think that any firm would let you keep goods for ten months before paying for them if you intended to just on the premise that you might return them. If you will show me [1101] the——

Mr. Drewes: I would like to ask that be stricken as non-responsive, your Honor.

A. I think it is very pertinent to the question you asked.

Mr. Drewes: That is not for you to decide, Mr. Hellman.

The Court: Well, it is in the nature of an argument. However, I suppose it has some responsive-

(Testimony of Roland Hellman.)

ness. It may remain in the record. It is an argument.

Q. (By Mr. Drewes): Let me restate the question again. I asked you if it were not possible under the assumption that the goods had been held for that reason that it is possible they were to be returned, the decision then being made to keep the goods, the entries would be made in the purchase register in December and that they would then be paid for in that month.

A. Based upon those assumptions, it is possible.

Q. It is possible? A. Yes.

Q. And if that were so, then the transaction should be included in Schedule 4 along with the Barney transaction, would that be correct?

A. As a withdrawal from cash in the box? No,—now—

Q. What?

A. If you say they—wrote them up in December '44 and then had paid for them, also assuming that they paid for them in [1102] December of '44?

Q. Mr. Hellman, you said that they had—I asked you initially, when we began this series of questions and responses, why you had not included the Money Back Smith transaction along with the Barney transaction.

A. That's right. Well, the answer would be—

Q. Your answer was because you had assumed that payment had been made before May 5—before the starting point of Schedule 4?

A. On the Barney or the Smith's?

(Testimony of Roland Hellman.)

Q. On the Smith's? A. Yes.

Q. If in fact payment had been made in December of 1944, then you would properly include the Money Back Smith transaction with the Barney transaction?

A. Yes, if I could not locate the payment being made from the store books.

Q. Well, you could not locate it, could you?

A. I didn't make any attempt. It would have been ridiculous to look at that spot for it. It's quite an assumption.

Q. Directing your attention next, Mr. Hellman, to the item, "Cash received from Fresno partnership," January 2nd, 1945, the amount of \$1807.46, and further down Schedule 4 a similar item, January, 1946, "Cash received from Fresno partnership," \$1725.11. [1103]

Upon what evidence do you base those two items?

A. Based upon the partnership income that Mr. Olender had reported for the year prior to the date that is shown there. In other words, partnership income from the Fresno partnership for 1944 was that amount plus—We took the amount reported and added depreciation, and that's the figure, and we showed as being received the first part of the year because Mr. Olender's statement was that he received it some time after the close of the year. He has testified to that, I believe. I don't know if he testified as to receiving it after the first part of the year, but he has testified to the money coming in in the form of cash.

(Testimony of Roland Hellman.)

Q. You relied entirely upon his testimony?

A. That and the income reported on the partnership return and his individual tax return, yes. As to the dates, was his testimony or information furnished me.

Q. Those two items are not included on your first schedule, were they included?

A. No, those items came out and we revised this schedule as I said several times, that these schedules can never be complete or you always find something one way or the other that belongs in or out. We worked on it, revised it. We think we have it fairly complete. We could find another item in or out.

Q. How did you find those two items?

A. During the controversy over the capital gain on the [1104] partnership in the income therefor, it dawned on us that we hadn't shown that on this schedule. Mr. Olender made the statement that that had come in in the form—would have gone into the safety deposit box in cash and mingled with his other cash, and so we decided it is proper to enter it in there.

Q. Did you look to see whether it had been entered in any other records of the taxpayer?

A. It wasn't entered on the store records. That was the only regular books he had. It wasn't entered as a deposit in his personal bank account.

Q. Was it entered in any other account?

A. Such as—

Q. Trustee accounts or his wife's account?

(Testimony of Roland Hellman.)

A. The partnership income?

Q. His income. The two items we are referring to.

A. No, I didn't find those in any other account.

Q. Were you able to find any record indicating the date upon which those receipts were—pardon me—the date upon which those funds were received by Mr. Olender?

A. Any record as to specific dates?

Q. Yes. A. No.

Q. Now with respect to the May 31, 1945 entry, there are on Schedule 4, Mr. Hellman, four items which total \$15,000, [1105] each referring to the cashier's check which is indicated by number. Upon what do you base those items, Mr. Hellman?

A. Well, that is based on information I secured from the Bank of America, upon visiting there, as to the numbers, and the dates, and the disposition of those checks was traced—the first one of \$3,000, that was traced to the deposit of—well, the bank actually traced it into the Army and Navy Store deposit of June 20, 1945.

The next item of \$3500 and \$3500, those checks indicated that they were purchased—they were used to purchase Treasury bonds at the Bank of America, College Avenue Branch, and Mr. Olender could confirm through some friend working there at that bank that he did purchase bonds there in that amount; and the other item was traced into the deposit of the Army & Navy Store as of June 20,

(Testimony of Roland Hellman.)

1945, and Mr. Olender has also testified to these transactions.

Q. Were you able to verify the sources of the funds?

A. Only to the extent that they were purchased with cash.

Q. Were you able to verify from where the cash came? A. Verify?

Q. Yes.

A. Is that—I couldn't verify it because I wasn't there when the cash was taken out. But I rely upon Mr. Olender's testimony that he took the cash in the vault.

Q. Now, with respect to the item of August 27, "Transfer to [1106] personal bank account," \$522—do you see that item? A. Yes.

Q. Is that item correct, Mr. Hellman?

A. Correct——

Q. Or is there another small error there?

A. Do you mean is that the amount of the deposit?

Q. Yes.

A. August 27, 1945, no, there is seventy-five cents change there, too. That total deposit for that date was \$854.88 and it included cash of \$522 and 75 cents coin. There were nine little miscellaneous checks totalling \$332.13.

Q. Did the coin come from the safe deposit vault, too?

A. Well, that's probably why I left it off because you wouldn't make an assumption that the change

(Testimony of Roland Hellman.)

came in there. I believe, though,—I might have—do you mind if I refer to these exhibits here?

The Court: We might take a short recess, and counsel can show the exhibits to the witness.

The same admonition.

(Short recess taken.)

Q. (By Mr. Drewes): Is there a pending question?

A. I think I was trying to explain the odd cents in that deposit there, the cash.

The reason for that is that the amount of deposit was to bring in his balance to an even \$1000 as of August 27, [1107] 1945.

Q. Why did you leave this 75 cents off?

A. There is no particular reason why. I see one place we did include the pennies and the two other places we did not.

Q. You are referring to the item of July 10, 1946, "Transfer to personal account," \$570.38?

A. Yes, that's right.

Q. Calling your attention to the next item, "November—purchase U. S. Treasury bonds, \$5000," upon what do you base that item?

A. That was based upon Mr. Olender's testimony as to the source of the funds to pay for it.

Q. Did you verify that?

A. You keep asking "verify." Do you mean by verifying to actually see the transaction? That's a general description of verifying, to actually see something.

(Testimony of Roland Hellman.)

Q. You're a public accountant. What does verify mean?

A. That's just what I am telling you. It means to actually see and verify. We're talking about something that happened seven years ago. How could I verify the withdrawal?

Q. Don't accountants frequently verify——

A. They attempt to.

Q. ——books of account some time after the records have been made?

A. You can verify it through a book of account, yes, if [1108] there is one kept. It has been previously stated there is no record that was kept of the withdrawals from the cash box or the amounts going in. This is only a reconstruction.

Q. Then you didn't verify that item?

A. Not that I actually saw it, no. It is based upon testimony of Mr. Olender.

Q. You haven't been able to verify it from any records that you were able to find?

A. No, except that the bonds were——once again the bonds were an item——the only dispute in the bonds were the \$20,000 that were the mother's bonds.

Q. Beyond the fact that bonds were purchased, you were not able to verify that item, is that correct?

A. That's——oh, just a second——I have——well, that item, yes——Merely on the testimony of Mr. Olender the fact that the bonds were purchased and——

Q. The next item is the November item, "Trans-

(Testimony of Roland Hellman.)

fer to savings accounts"—the three accounts listed, all trustee accounts, and in each case the amount shown is \$5,000. Upon what do you base those items?

A. There are exhibits in evidence of the deposits being made in these trustee accounts and evidence of the TCR's that that plus the \$10,000 item following, that there was \$25,000 cash deposits in the commercial account—commercial—well, the TCR's say all commercial, but the savings accounts [1109] are not considered commercial accounts. The \$10,000 personal account would be commercial. And there is also testimony to the effect—

Q. Considering that all of those four items together in the amount of \$25,000, were you able to verify the cash used therefor came from the box?

A. Not from any written records.

Q. The items shown in 1946, the respective dates: May 1st, 2nd, July 10, September 18th, September 23, November 25, December 4, December 20, excluding the down payment at W. & J. Sloane, were you able to verify the deposits in the accounts shown?

A. Yes.

Q. That they came from the—

A. Excuse me—

Q. —the safe deposit vault?

A. Not that they came from the vault. I verified where they went.

Q. In each one of those cases each item represents a receipt for a deposit in the accounts which are described there, is that correct?

(Testimony of Roland Hellman.)

A. As to the exhibits that are in evidence, yes, they indicate going into those accounts.

Q. But you were unable to verify the sources of deposit?

A. No written verification, no. [1110]

Q. Now calling your attention to the item, "Non-deductible expenditures included in stipulation," \$1340.40. What does that represent, Mr. Hellman?

A. That item represents an amount that we verified with Mr. Mytinger as to being what was in the stipulation as to cash expenditures.

Q. You verified it with Mr. Mytinger?

A. Mr. Lieberman did, and he passed the information on to me.

Q. Do you know what that item consists of?

A. It is for non-deductible expenditures, personal payments made with cash. I don't know the exact—who cash payments were made to, no.

Q. Do you know of what it consists?

A. It's covered by stipulation, Mr. Drewes.

Q. That item doesn't appear in the stipulation, does it?

A. Not on the stipulation, but it was relayed—the information as to that amount was relayed to Mr. Lieberman by Mr. Mytinger as being part of the stipulation. If that is a specific item does not, but I understand there was some argument on the amounts in the stipulation, and that was the figure that Mr. Mytinger gave Mr. Lieberman.

Q. Do you know if that figure shown there is correct?

A. Only through what Mr. Mytinger told Mr.

(Testimony of Roland Hellman.)

Liberman. If Mr. Mytinger made a mistake, I don't know, other than the [1111] information was passed on to me.

Q. You prepared this schedule, didn't you?

A. That's right.

Q. You don't know whether that figure is correct or not?

A. It is an item covered by stipulation, Mr. Drewes, as to how much cash was spent. If your own Government agent tells us that that is the amount stipulated to, we accept that particular figure.

Mr. Drewes: May that be stricken as non-responsive, your Honor?

The Court: Motion denied.

Q. (By Mr. Drewes): Now, Mr. Hellman, do you recall testimony by Mrs. Widrin to the effect that she gave to Mr. Olender approximately \$575 in 1945?

A. I recall reading about it.

Q. You recall that in the transcript?

A. Yes.

Q. That is not included in Schedule 4?

A. No, that and the other \$2500 gift were considered as a wash item and were not put in there.

Q. What do you mean by wash item, Mr. Hellman, for the benefit of the Jury?

A. The money was given to Mrs. Olender. It was given to Mr. Olender and passed on to her. It was a wash item.

Q. I assume you mean then that the money went in and out in [1112] the same period?

(Testimony of Roland Hellman.)

A. That's right.

Q. If the funds were in the possession of the taxpayer at the time in 1945 or 1946 and were not dispensed—disbursed by him in either one of those years, it would be on the schedule, is that what you mean?

A. Yes, if he hadn't—they would be included on there if they hadn't been paid out yet.

Q. Will you turn to Schedule 3 and 3-A, Mr. Hellman?

A. I have them here.

Q. I call your attention to Schedule 3-A particularly.

A. Amended 3-A?

Q. Yes, the amended 3-A.

A. Yes.

Q. Halfway down the page you show non-deductible gifts received as a deduction January 2nd, 1945, Mollie Olender, \$3,000. What is that item?

A. That was a gift shown as being received from Mollie Olender, mother, going through and not being an income item. It was deducted from the total income.

Q. And that item comes allegedly from the taxpayer—strike that—that gift allegedly came from Mrs. Mollie Olender's bank account in Fresno, did it not?

A. From where?

Q. That gift allegedly had its origin in Mrs. Olender's [1113] saving account in Fresno?

A. That is not my understanding, no.

Q. What is it?

A. That was a gift from Mrs. Olender to Mr.

(Testimony of Roland Hellman.)

Olender of which we are not certain as to the source of the funds.

Q. Do you still have Exhibit 25 for identification?
A. Yes.

Q. Let me call your attention to the last item on the last page of Exhibit 25 for identification, January 12, 1945, \$3,000 withdrawn from savings account, Fresno. Is that not the same item?

A. I testified about twenty minutes ago that it was not, as far as I knew.

Q. Now with respect to the next item shown as a non-taxable—strike that—as a gift received by the taxpayer August 24, 1945, Mrs. Widrin, \$575.

Isn't that the money which Mrs. Widrin testified she gave to the taxpayer in 1945?

A. That's right.

Q. And wasn't the purpose of that transaction to defray the funeral expenses of Mrs. Foote?

A. I believe that is the way the testimony reads.

Q. And you have examined the cancelled checks of the taxpayer, have you not, for the year 1945, which are in evidence in defendant's Exhibit [1114] AF?

A. I have gone through them, yes.

Q. I call your attention to a check dated September 12, 1945, in the amount of \$407.27. You recall that check?

A. I have seen this check, yes.

Q. And is there not a notation on that check?

A. Yes, it is made out to Mr. Gray & Company, which is, I believe—I know is a funeral parlor in San

(Testimony of Roland Hellman.)

Francisco, \$407.27. Marked on the bottom "From Mrs. Foote's personal account." Dated September 12th, 1945.

Q. May I see them? I show you another check included in Defendant's Exhibit AF dated August 26, 1945, in the amount of \$110—some odd cents—

A. \$110 even, I believe.

Q. And who is the payee of that check?

A. Belmont Memorial Park Cemetery Association.

Q. Mr. Hellman, wouldn't those two checks indicate to you that the sum which was conveyed by Mrs. Widrin to the taxpayer was disbursed for the purposes indicated in the same year?

A. That's right.

Q. Then is it your opinion that the amount of \$575 should be deducted from Schedule 3-A?

A. The money went into his personal bank account, so the funds came out—it would be part of his deposits going through the bank.

Q. This represents another, which you referred to as a wash [1115] entry, does it not?

A. It would, inasmuch as the deposit was made in August—the money went out in August and September—it would be a wash item.

Q. Then should that be deducted from the taxpayer's income for that year as you have indicated on Schedule 3-A?

A. Inasmuch as the disbursements were made prior to the close of the year, that amount would not appear in the commercial bank account balance

(Testimony of Roland Hellman.)

as of the end of the year. If this amount is not—it is included in the non-capital expenditures, it would be correct there. If it is not, then it would not belong there.

Q. What is your conclusion, Mr. Hellman? The money was given to the taxpayer by Mrs. Widrin for specific purposes, to use it for that purpose in the same year. What is your result?

A. I don't see it referred to here in the stipulation. Although there was a—if that item is not in the stipulation, it doesn't belong there, and I don't see whether it is included in the stipulation or not. Now, this isn't all of the total amount stipulated to as non-capital expenditures—non-deductible expenditures.

Q. Your conclusion is then that it is not included in the stipulation, therefore it should go out, is that correct?

A. Yes. [1116]

Q. Now, Mr. Hellman, calling your attention to the next item, August 24, 1945, Mrs. Foote, \$2500. Will you explain that item?

A. That was a gift received by Mr. Olender. I believe there is testimony on that from Mrs. Foote in 1945.

Q. Do you recall Mr. Olender's testimony as to the disposition of that item?

A. No, I can't say that I recall just what it was.

Q. You read the transcript?

A. Yes, I looked at the transcript. There's just about a thousand and some odd pages. It's rather

(Testimony of Roland Hellman.)

difficult to remember everything you hear and read, questions and answers that have been asked.

Q. Do you recall Mr. Olender's testimony as to his disposition of that \$2500?

A. I can't—

Q. What he did with it?

A. Offhand I can't say that I do recall it. You would have to refresh my memory on his testimony.

Q. Didn't Mr. Olender testify that he put that money in his safe deposit vault?

A. With reference to this specific transaction?

Q. With respect to the \$2500 that he received from Mrs. Foote?

A. I can't say for certain. If it's in the transcript, it's [1117] there.

Q. I will refresh your recollection by reading from page 891, which is in Volume 12, counsel, beginning at line 17:

“Is it now your testimony that \$3,000 of that money was or was not money of your mother-in-law, Mrs. Foote?

“A. It was.

“Q. It was money of your mother-in-law's, Mrs. Foote? A. That's right.

“Q. And under what circumstances did your mother-in-law give you that \$3,000?

“A. Part of it came from Mrs. Widrin, as she testified, and I had the balance and I had the money in my safe deposit box.”

Does that refresh your recollection?

A. Yes, as to the statement that it was in the box, yes.

(Testimony of Roland Hellman.)

Q. Mr. Hellman, shouldn't that sum of \$2500 be included in cash in the vault in 1945?

A. As an addition, you mean?

Q. Yes.

A. If the cash was on hand in the box and there is testimony—

Q. That he put it there?

A. Yes. That was the testimony of a few days ago. If that belongs in there, that should be an addition in the box, [1118] that's right.

Q. And what effect will that have on Schedule 4?

A. That item alone, assuming that we have found all other additions and withdrawals, would affect the balance of cash at the end of '45 by \$2500, and depending—then this item—that was taken out of Schedule 4 down there—the Magnin and Gray Company, which I don't know has ever been settled or not—would add to that balance by \$2500 at the end of 1946.

Q. And what effect would that have on the defendant's income for the year 1945?

A. May I explain a point?

The Court: Yes.

The Witness: May I explain a point regarding that?

The Court: Yes.

A. Well, the income as revised, that would add to your—increase your net worth at the end of '45, therefore increasing the income computed on a net worth basis of '46. You would have a larger opening net worth and a larger closing net worth, so

(Testimony of Roland Hellman.)

there would be no change in '46 if that cash were on hand at the end of '46.

Q. (By Mr. Drewes): There would be no change in '46. What would the effect be on unreported income of the defendant in 1945?

A. On the net worth method that would increase the net worth [1119] at the end of '45. Therefore it would increase the total income, reduce the understatement of—it would increase the understatement of income.

Q. By a similar amount? A. \$2500, yes.

Mr. Drewes: Does your Honor wish to recess at this time?

The Court: Yes. We might take the recess and adjourn until Monday at ten o'clock.

The case will probably go to the Jury, I am informed, ladies and gentlemen, Tuesday or Wednesday at the latest.

Mr. Drewes: My best estimate will be Wednesday.

The Court: You will probably argue the case Tuesday.

Mr. Hagerty: I think so, your Honor.

The Court: We will adjourn then until Monday, at ten o'clock, with the same admonition, not to discuss the case or form an opinion until the matter is submitted to you.

(Thereupon an adjournment was taken until Monday, October 6th, 1952, at ten o'clock [1120] a.m.)

(Testimony of Roland Hellman.)

Monday, October 6, 1952, 10:00 A. M.

The Clerk: United States vs. Olender, on trial.

The Court: The Jury is present.

Mr. Drewes: So stipulated.

The Court: You may continue, gentlemen.

ROLAND HELLMAN

resumed the stand, and having been previously duly sworn, testified further as follows:

The Clerk: Mr. Hellman, will you please restate your name for the record?

A. Roland Hellman.

Cross-Examination

(Continued)

By Mr. Drewes:

Q. Mr. Hellman, calling your attention now to Schedule 3. As has been earlier indicated by you, the upper half of that schedule reflects the taxpayer's net worth as computed by the Government. That is correct?

A. Yes.

Q. And the lower half represents the additions and reductions which the defense contends should be made in computing the computation, is that correct?

A. Yes.

Q. Now calling your attention particularly to the year 1944, under reductions, amount paid for Goodman sailor suits [1121] awaiting disposition, and so forth, \$20,550 even. You have included that figure as an addition upon the assumption that in

(Testimony of Roland Hellman.)

1944 none of those goods had been sold, is that correct? A. Yes.

Q. Were you able to verify that fact, Mr. Hellman?

A. No. Not direct verification as to when the merchandise was actually sold, other than through the testimony of Mr. Olender and Mr. Leavy and——

Q. But you do not know as the result of your audit that those suits remained on hand as of December 31, 1944?

A. No, I couldn't verify the physical inventory of those suits.

Q. If, in fact, any part of those suits had been sold, what would be the effect from an accounting point of view with respect to the net worth position as of December 31, 1944?

A. If some of those suits had been sold, well, either if they had been sold at retail, they presumably would have gone through the register sales. If they had been sold at wholesale lot, at cost, if the money was kept by Mr. Olender, and inasmuch as it never had been on the books, it would be right for him to keep it, but it would have the effect of reducing the available addition.

Q. In other words, to the extent that any of those suits were sold before the date shown, the figure of \$20,550 would have to be reduced accordingly, is that correct? [1122]

A. Yes, unless the—if you assume a sale—and that might—if you do—say, as an example, he sold

(Testimony of Roland Hellman.)

\$5,000 worth in 1944 and that came in in the form of cash, that would correspondingly be an increase, an addition to the Schedule 4, cash on hand—if it were actually cash on hand at that time.

Q. Unless, of course, the sale had been made before May 5, 1944, and in which case the cash would not be included on Schedule 4.

A. Yes, but that—I don't think that is very likely, according—

Q. Well, the entire item is a matter of assumption one way or the other.

A. Except for the delivery of the merchandise.

Q. You have included the figure on the assumption that the inventory was on hand and not sold. Now, if you assume that the merchandise had been sold, the other assumption, and that it had been sold before May, 1944, then it would not be included in the net worth, isn't that correct?

A. That's correct. There are—that schedule, I believe it is 26, showing the dates the merchandise was received in the Goodman transaction, show that none of them was received before May, 1944.

Q. My understanding of the record, Mr. Hellman, is that Mr. Olender testified the goods were received in January or [1123] February of 1944?

A. My recollection is he didn't remember specifically when the merchandise was received. Mr. Ringo's work sheet shows some dates of the Goodman merchandise being received, on that Schedule Exhibit—I believe it is 26.

Q. There was also another purchase of Good-

(Testimony of Roland Hellman.)

man merchandise in the year 1944, was there not?

A. For \$1380, yes.

Q. Was it possible to determine whether receipts to which you refer pertain to that last purchase or to the earlier purchase?

A. Yes, it is, because the earlier purchase shows in—up to \$20,550 of merchandise. So it couldn't be the \$1380 that came in at a later date.

Q. Didn't you tell me you were unable to find any invoices at all concerning the Goodman transaction?

A. No specific invoices, but in going over Mr. Ringo's work papers there appears there a summary right under the cash analysis that he made—there is a summary of the receipt of the Goodman merchandise, and that's on the—it's right in the exhibit there. It's in evidence there.

Q. But that information was received by Mr. Ringo from Mr. Olender, isn't that correct?

A. Mr. Olender told me differently than that, that Mr. Ringo— [1124]

Mr. Drewes: May that be stricken, your Honor?

Mr. Hagerty: Well, if your Honor please—

Mr. Drewes: We are confined to the record here, and we are—Didn't Mr. Ringo—

The Court: That may go out. That may go out.

Q. (By Mr. Drewes): Didn't Mr. Ringo testify in connection with the exhibit to which you refer that he had gotten that information from Mr. Olender?

A. I don't know if it was in—testified to that

(Testimony of Roland Hellman.)

specific point in full. My understanding was——

Mr. Drewes: May that—I don't want your understanding. We are concerned, Mr. Hellman, with the record as it now appears.

Now I will ask you if it is not your recollection that Mr. Ringo testified that the information concerning the receipt of the Goodman transaction came from Mr. Olender?

A. I can't remember specifically if that is Mr. Ringo's testimony. Do you mean——

Q. Do you remember Mr. Ringo testifying that he was never able to clarify the Goodman transaction in its entirety? A. To that effect, yes.

Q. Mr. Hellman, you recall Mr. Olender testifying that the Goodman suits were not included on his inventories as reported on his tax returns for 1944 and 1945? [1125]

A. When he was testifying to that——

Q. Will you answer my question, Mr. Hellman, and then you can explain. Do you recall that testimony? A. Yes.

Q. Now, in view of that testimony, do you think that it is sound practice to include \$20,550 as being on hand as of December 31, 1944?

A. Yes. Do you want it explained or——?

Mr. Hagerty: You may explain your answer.

A. Well, when Mr. Olender was testifying there was—if you will read the transcript—there was a confusion as to the dates, and he later corrected himself by saying that that merchandise, or a por-

(Testimony of Roland Hellman.)

tion of it, was included in December 31, 1945, but not at December 31, 1944, and the reason I feel that is proper accounting to include this as an addition to the December 31, 1944, net worth is because this was considered as a flow of personal funds up until some time in 1945 when they were able to dispose of some of the suits through wholesale, and those they couldn't dispose of went into the inventory, and if that was a separate asset, such as he had other assets apart from the store business, that would properly be an additional asset at the end of 1944.

Q. (By Mr. Drewes): The Army & Navy Store is a sole proprietorship, isn't it, Mr. Hellman?

A. That's correct. [1126]

Q. It is not a corporation? A. No.

Q. Then either as a matter of law or as a matter of accounting fact and practice is there any basis for making a distinction between the assets owned by a man individually and those which he has in his store which he himself owns alone?

A. It is acknowledged that the—if the transaction had been handled properly on the books, if Mr. Olender had proper accounting procedure, the \$20,550 would have been taken onto the books. But inasmuch as it wasn't, and in locating that error, it is proper accounting practice to correct that error.

Q. Your answer serves to recall earlier testimony, Mr. Hellman, in which you stated that if a business man included on his books both wholesale

(Testimony of Roland Hellman.)

and retail sales, the effect would be to reduce his gross profit and thus distort the operations of the business as reflected by his books, is that correct?

A. I believe I said something to that, yes.

Q. Would you advise a client of yours to leave wholesale sales off his books to avoid that distortion?

A. Certainly not. It would be kept track of separately, not mingled with the retail sales.

Q. As a matter of fact you would advise a client of yours that he should keep whatever books and records are necessary [1127] to enable him to determine what his gross profit is, including inventories and whatever deductions he might have, would you not?

A. Yes, I would advise him to keep the records in all transactions.

Q. As a matter of fact, the law so requires, does it not?

A. It states that records will be kept in order to determine the correct income, yes.

Q. Can income be correctly determined, Mr. Hellman, when only part of the transactions are reflected in the books?

A. No, it couldn't, naturally it couldn't be.

Q. Now turning your attention to the item under reductions, the first item, 1945, 1946, \$20,000—now that represents a reduction in the taxpayer's net worth on the theory that \$20,000 in bonds belonged to his late mother, is that correct?

A. Yes.

(Testimony of Roland Hellman.)

Q. Were you able to verify that those bonds belonged to his mother?

A. I didn't see the physical bonds but there has been testimony by Mr. Ringo and Mr. Olender—

Mr. Drewes: May that be stricken, your Honor?

Q. Just answer my question and then you may explain. Were you able to verify that those bonds belonged to his mother?

A. Verified to the extent possible in an audit of this type, yes. [1128]

Q. And of what did that verification consist?

A. From testimony and from an analysis of Ringo's computation of the total bonds and also—well, that Ringo—and then Ringo's statement and Mr. Olender's testimony.

Q. You base your answer on what you heard Mr. Olender say in Court and what another accountant did?

A. Plus verifying the summary that was made by Mr. Ringo.

Q. Well, you yourself were unable to verify that these bonds belonged to the late Mrs. Olender, is that correct?

A. At this time it would be impossible to verify that.

Q. The records show, I believe, that Mrs. Olender passed away in 1951. Have you ascertained whether or not the \$20,000 worth of bonds which we are discussing have been included in her estate for the purposes of probate?

A. No, I haven't determined that.

(Testimony of Roland Hellman.)

Q. Mr. Hellman, quite early in your testimony on direct examination by defendant's counsel you testified that in 1945 the defendant picked up or included for the first time on his inventory Goodman suits at the value of \$8,550; that, however, he had not included that sum in purchases for the year, and for that reason his gross profit for 1945 was reduced from the sum of \$45,000 to the sum of \$32,000, in round figures. Do you remember that? A. Yes, I do.

Q. You remember that testimony? [1129]

A. Yes.

Q. I want to be certain the ladies and gentlemen of the jury understand just how that works. How is the cost of goods sold determined, Mr. Hellman?

A. You start with your opening inventory, add your purchases during the year, plus any—and then subtract your closing inventory and arrive at your cost of goods sold for the year.

Q. In other words, cost of goods sold equals your beginning inventory plus purchases during the year, minus your ending inventory, is that correct?

A. That's right.

Q. And your testimony was to the effect that in the year 1945 the taxpayer included for the first time \$8,551 in Goodman suits. Inasmuch as he had not also included it in purchases for that year, the result was to understate his cost of goods sold and thus overstate his profits for that year, is that correct?

A. Basically it is correct, but there is a little

(Testimony of Roland Hellman.)

technical difference. Part of it should have been in purchases, not the full \$8,550 was in the inventory. 79—

Q. The 20 suits sold—

A. Thus accounting for that part that would have gone into inventory—

Q. But subtracting the figure from the ending inventory and failing to include it in purchases you overstate—you [1130] understate the amount of your cost of goods sold and therefore you overstate profits, is that correct?

A. You said it understates the cost of goods sold?

Q. By understating the cost of goods sold you overstate profits, right? A. Yes.

Q. Now I am going to hand you the Government Exhibit 9, which is the 1944 tax return for the taxpayer, and ask you to calculate the gross profit ratio for the year 1944 as shown on that return. Do you have paper there?

A. Yes. (Short pause.) 33 plus per cent.

Q. Would you please do likewise from the Government's Exhibit No. 1, which is the taxpayer's return for 1945?

A. 31.9 per cent. Practically 32. 31.9.

Q. I now hand you the Government Exhibit No. 2 which is the taxpayer's 1946 return and ask you if you will calculate the gross profit ratio for that year? A. 38.3 per cent.

Q. What is that again? A. 38.3.

Q. So, Mr. Hellman, whereas you testified that

(Testimony of Roland Hellman.)

the gross profit for the year 1945 had been overstated by a substantial amount, in fact the gross profit ratio for that year was lower than for any of the three years in question, is that correct? [1131]

A. According to those figures, yes.

Mr. Drewes: I have no further questions.

Redirect Examination

By Mr. Lewis:

Q. Mr. Hellman, on the Riverdale Ranch sale I think you were asked to compute the effect of that, and the Wilson transaction, on the taxpayer's income for the year 1946. During the week end did you have an opportunity to make that computation?

A. I have rechecked it, yes.

Q. What is the total net income tax for Mr. and Mrs. Olender on the basis of using the correct estate tax basis as the cost for the Riverdale Ranch and the loss on the Wilson home?

A. That specific item when added to the income tax return as filed, not considering any other changes, would result in a total additional tax of only \$497.64.

I previously told you the maximum would be \$504. I believe the other day I testified, after hasty computation up here, that the tax would have been \$542. But there are several ramifications and technicalities in there which I discovered, and I made the change.

The actual tax on that one transaction would have been \$497.64.

(Testimony of Roland Hellman.)

Q. Friday you were asked by Mr. Drewes concerning the Widrin gift of \$575, which it was testified to here was spent on—a good part of it—on funeral expenses. I notice that at [1132] page 1116 of the transcript Mr. Drewes says:

“Your conclusion then that it is not included in the stipulation, therefore it should go out, is that correct?”

You answered: “Yes.”

Mr. Drewes, didn't you mean by that that your conclusion then is that if it is not included? I think the reporter left out the “if”?

Mr. Drewes: Well, that would complete the question, I am sure.

Mr. Shelton: If your Honor please, I think it would be appropriate if the record would show at this time that that 575 item was not included in the stipulation. I think the defense counsel will concede that.

Mr. Lewis: Well, I haven't got the breakdown. If Mr. Mytinger says it was not, I am satisfied.

Mr. Shelton: Mr. Mytinger, is that correct?

Mr. Mytinger: Yes.

Mr. Shelton: He says it is not, Mr. Lewis. May it then be stipulated it is not included in the stipulation?

Mr. Lewis: Yes.

Mr. Shelton: Thank you.

Mr. Lewis: That can be stipulated.

Q. Now, Mr. Hellman, referring again to the Riverdale and the Wilson home transactions. Will

(Testimony of Roland Hellman.)

you explain to the jury [1133] just how you worked out those computations?

A. Well, I started with the taxable income per the return. I added back—inasmuch as the return of Mr. Olender included the partnership income from Fresno which included the loss of some eighty—close to eighty some odd dollars, his share was \$19.04—I had to add back that portion of the loss of the \$19.04, which came through in the partnership item. Then I added back one-half of the loss on the Wilson Avenue property. Only one-half was added back because the other half of that loss was reported by Betty Olender, Mrs. Olender, and she does not share in the capital gain of the Fresno partnership of the \$2,016 capital gain as adjusted to the error on the basis used. So the \$495.17 is added back to Mr. Olender's income, making a taxable income, without considering—without any losses of any \$12,029, and then to that we would add the capital gain of \$2,016, subtract one-half of the Wilson Avenue loss of \$495.17, making a net gain of \$1,520.83, of which one-half would be taxable, or \$760.42, leaving a total taxable income on this one—these two adjustments as the return was reported—of \$12,789.44, resulting in a tax of \$3,552.49. The tax reported was \$3,054.85, a difference of \$497.64, and there would be no change in the computation of the tax on the return of Betty Olender.

Q. Now, Mr. Drewes' little chart here on the percentage of [1134] gross profit as shown by Mr. Olender's business for the years 1944, 1945 and

(Testimony of Roland Hellman.)

1946. As a matter of accounting experience, isn't there quite frequently a large variation in gross profit in the conduct of a business such as this?

A. Well, it's hard to say. As a general rule business percentages do vary. There is—oh, I wouldn't say just how much they would vary from year to year. There appears to be a variation between 1945 and '46 around 7 per cent. They could vary from five to ten per cent, depending upon, of course, upon the types of merchandise and the saleability and so forth.

Mr. Lewis: No further questions.

Mr. Drewes: No further questions.

(Witness excused.)

Mr. Lewis: Mr. Mytinger.

HUBERT C. MYTINGER

called by the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the Jury.

A. Hubert C. Mytinger, technical adviser, Office of Regional Counsel, Penal Division, Bureau of Internal Revenue, San Francisco.

Q. Your address?

A. 100 McAllister Street. [1135]

Cross-Examination

By Mr. Lewis:

Q. Mr. Mytinger, you are also a certified public accountant, are you not? A. I am.

(Testimony of Hubert C. Mytinger.)

Q. Now I refer you to the Government exhibit which you based your calculations on—have you that exhibit?

A. No, I haven't, Mr. Lewis. I believe it is in evidence.

Q. I show you U. S. Exhibit 51. You prepared that exhibit, did you not? A. I did.

Q. Taking up the first item. Assets, cash in store registers, \$2,500, 1944. \$1,000 for the next two succeeding years.

As a certified public accountant, could you certify to that figure?

A. My answer to that would be equally applicable to all of these items, Mr. Lewis. I made no independent verification.

Q. In other words, you never independently verified a single item on the basis of which you based your calculations? A. That is correct.

Q. I show you a book here. Can you identify that book?

A. Yes, that is Volume 1 of the 1946 Prentice Hall Federal Tax Service.

Q. Now I want you to turn to the page that is marked there. [1136] What is that chapter?

A. The chapter is entitled, "Basis for determining gain or loss, depletion and depreciation."

Q. How many pages does that chapter consist of?

Mr. Shelton: Objected to, if your Honor please. This is collateral to the issues in this case, as to how many pages there are in that particular chap-

(Testimony of Hubert C. Mytinger.)

ter. Isn't that the Prentice Hall Service, Mr. Lewis?

Mr. Lewis: Yes. I think it is relevant. They have brought up the point here that Mr. Olender had an intent to evade his income tax by using the wrong basis on the sale of the Riverdale Ranch, and here is an expert. The jury doesn't know whether or not a man should know that or not, and I just want to introduce that book into evidence for the sole purpose of showing that that is a very complex subject. A layman wouldn't necessarily know how to handle it.

Mr. Shelton: Counsel——

The Court: Well, it would not follow, counsel, either logically or otherwise, by reason of the number of pages a man might establish his or her intent. And under the circumstances I sustain the objection. If you desire to inquire of him specifically upon any phase of the matter, you may do so. A complex paragraph in a half a page may be more abstruse than a thousand pages. Isn't that true?

Mr. Lewis: That is correct, your Honor. [1137]

The Court: All right.

Q. (By Mr. Lewis): Will you turn to the paragraph in that book dealing with the basis—the sections in that book dealing with the basis of real estate acquired by inheritance?

A. I believe you mean that portion entitled "Property transmitted at death"?

Q. Yes. Will you read that to the jury?

(Testimony of Hubert C. Mytinger.)

Mr. Shelton: If your Honor please, I object on the ground that that's not the proper way to introduce in evidence what counsel appears to have in mind doing. I mean the question is not on the general subject of the basis of property values per capital gains. But the question, I submit, should properly be tied into this particular problem, and on that ground the Government will object.

Mr. Lewis: Your Honor, I think I asked him the specific question, the basis of property transmitted at death.

The Court: The objection is overruled.

A. Mr. Lewis, which do you want me to read now, the law, the regulations, or the editorial comment?

Q. (By Mr. Lewis): The law and the regulations will be sufficient. The editorial comment is quite extensive.

A. And you want me to read the entire section of the law covering this?

Q. Yes, the statute.

A. The section is known as Section 113A, Internal Revenue [1138] Code. It is entitled subsection 5, "Property transmitted at death."

"If the property was acquired by bequest, devise or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor

(Testimony of Hubert C. Mytinger.)

at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. For the purpose of this paragraph property passing without full and adequate consideration under a general power of appointment exercised by will shall be deemed to be property passing from the individual exercising such power or by bequest or devise. If the property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, and if the decedent died after August 26, 1937, and if the property consists of stock or securities of a foreign corporation, which with respect to its taxable [1139] year next preceding the date of the decedent's death was, under the law applicable to such a year, a foreign personal holding company, then the basis shall be the fair market value of such property at the time of such acquisition or the basis in the hands of the decedent, whichever is lower. In the case of an election made by the executor under Section 811(j), the time of acquisition of the property shall, for the purpose of this paragraph, be the applicable valuation date of the property prescribed by such section in determining the value of the gross estate."

Mr. Lewis: I think that will be enough. I just wanted to show it is not a simple subject. No further questions.

(Testimony of Hubert C. Mytinger.)

Redirect Examination

By Mr. Drewes:

Q. Mr. Mytinger, you don't have the Government exhibit—what was the number——

Mr. Lewis: 51.

Q. (By Mr. Drewes): You testified with respect to the Government Exhibit No. 51 that you made no verification in connection therewith?

A. I have made no independent verification, that's right.

Q. However, in compiling the Government Exhibit No. 51 you had the benefit of the work done by revenue agent Root and special agent Whiteside, had you not? A. That is true. [1140]

Mr. Drewes: No further questions.

(Witness excused.)

Mr. Lewis: Your Honor, we expect another witness at 11 o'clock. Could we have the recess at this time?

The Court: Yes.

Ladies and gentlemen, we will take the morning recess, and with the same admonition to you not to discuss the case or form an opinion until the whole matter is submitted to you.

(Short recess taken.)

Mr. Hagerty: The defense will call Mr. Lorenzen.

HIRAM A. LORENZEN

recalled by the defendant, sworn.

The Clerk: Please restate your name for the record.

A. Hiram A. Lorenzen.

Direct Examination

By Mr. Hagerty:

Q. Mr. Lorenzen, I show you certain invoices here and ask you if you can identify them?

A. Yes, I can.

Q. What are they?

A. They are invoices that were made for merchandise sold to Mr. Olender.

Q. Are these invoices on the store of Money Back Smith? A. They are. [1141]

Q. You are still employed with that firm today, are you? A. That's right.

Q. And are those invoices the same as your invoices today? A. No, they are not.

Q. In what respect to do they differ?

A. Our firm name has been changed and our system is entirely changed from this.

Q. When did those changes occur?

A. About 19——

Mr. Shelton: Just a minute. Objected to, if your Honor please. This comparison with the system now and then is irrelevant.

Mr. Hagerty: I will withdraw the question, your Honor.

At this time I would offer into evidence these in-

(Testimony of Hiram A. Lorenzen.)

voices which have been shown to the Government counsel.

Mr. Drewes: Mr. Hagerty, I understood that some of those were copies and some duplicates.

Mr. Hagerty: Yes. We have two groups of invoices. The pencil copies are the originals, and the typewritten copies are the duplicates.

Is that true, Mr. Lorenzen?

A. That's right.

Q. Will you explain to the Court why you made duplicates of the originals?

A. Well, it is because Mr. Olender either lost them or didn't [1142] have them and that is after our statement was sent to him, and he asked us to send him duplicate invoices, or he picked them up from us.

Q. And then these records were made under your direction?

A. That's correct.

Q. Is that true?

A. Yes.

Q. From your firm's books?

A. That's right.

Q. And those books are kept in the due course of business, is that true?

A. That's right.

Q. And these are true and accurate records of what they speak for on their face?

A. Yes, they are.

Mr. Drewes: May I ask one question?

Mr. Hagerty: Again I renew the offer.

Mr. Drewes: I would like to ask one question on voir dire before you offer them.

(Testimony of Hiram A. Lorenzen.)

Mr. Hagerty: Yes.

Mr. Drewes: I have examined them briefly, Mr. Lorenzen, and I note that the originals are marked "Paid," whereas the duplicates show the date of payment. That is in some cases. Can you explain?

A. Yes. [1143]

Q. Why is that so?

A. These duplicates were made out after our statement was sent out and he asked for the duplicate bills. So those that were marked "Paid" we marked "Paid" on them and those that were not we left open.

Q. I had particular reference to the date of payment, Mr. Lorenzen.

A. That was the date in our books that the invoices were paid.

Q. Oh, I see. You included on the duplicate, you included the dates?

A. I don't quite understand you.

Q. When you furnished duplicates to Mr. Olender, you included the dates of payment which did not show on the originals?

A. That's right. The originals were not paid for at the time they were made out.

Q. And do you recall approximately when Mr. Olender requested the duplicate invoices?

A. No, I wouldn't know. It would be after the first of the month. After the merchandise was shipped to him. After we had rendered him a statement.

Mr. Drewes: No further questions.

(Testimony of Hiram A. Lorenzen.)

Mr. Hagerty: Again I renew my offer, your Honor, of these exhibits in evidence as the defendant's next in order. [1144]

The Court: They may be marked.

The Clerk: Defendant's Exhibits AM and AM-1 in evidence.

Mr. Hagerty: No further questions of this witness.

Cross-Examination

By Mr. Drewes:

Q. One or two questions, Mr. Lorenzen. Do you know whether these invoices were paid by check or by cash?

A. No, I do not. I don't remember that.

Q. Will your books reflect——

A. If I had——

Q. ——for the period in question whether or not——

A. If I had those books, they would. But we have destroyed all those old books over five years old.

Q. You are unable to produce them for that reason?

A. I haven't been able to find them, no.

Mr. Drewes: Your Honor, may we examine those for just a moment?

The Court: I will reserve my ruling until you have completed your examination. I thought you had examined them.

(Testimony of Hiram A. Lorenzen.)

Mr. Drewes: Very briefly.

Mr. Hagerty: I might say, your Honor, that the defendant spent the week end searching for records in response to the question of either your Honor or the Government counsel and that is why these are here. [1145]

The Court: I notice they have a numbering machine stamp on them showing that at one time or another they were numbered, apparently in sequence by numbering machine, and some of them have, at least 1739, 1740, and the like—

Mr. Hagerty: Yes. Maybe Mr. Lorenzen can tell us about the numbering method of those invoices.

A. We had several pads that we would number in advance and we numbered the full pad.

Mr. Hagerty: Does your firm still use that type of invoices? A. No, we do not.

Mr. Hagerty: The name is different, is that true? A. That's correct.

Q. (By Mr. Drewes): One or two further questions, Mr. Lorenzen. And I simply want to be sure I understood your testimony. The originals, in some cases, are not marked with the date of payment?

A. No, they were not paid. I don't think you find any of the originals with the mark of payment on them, do you?

Q. Well, possibly you better examine them and explain for us, Mr. Lorenzen, so there is no misunderstanding here. (Handing to witness.)

(Testimony of Hiram A. Lorenzen.)

A. Are these the originals?

Q. Here is—in light red pencil here is the mark, the letters “PD” and the date. [1146]

A. He most likely brought this invoice over with him to the store and when the girl checked it, it was marked “paid.”

Q. Mr. Olender brought that over?

A. Yes.

Q. And it is your understanding that that is his notation?

A. No, I think this is the girl’s notation, if I am not mistaken. It could be his, but I wouldn’t say. But it looks like hers.

Q. Now here is a duplicate invoice which is marked “paid 2/14/44,” and your original has no mark of payment on it at all?

A. No. Well, this was sent with the merchandise to him. He most likely came back and asked for these, a copy of these invoices, and we gave it to him and those that were marked—those that had been paid we marked them paid.

Q. I see. And to the best of your recollection how long after the purchases were made did he request duplicate copies?

A. Oh, I would say a month or two after that.

Mr. Drewes: I have no further questions.

Mr. Hagerty: We have no further questions. Thank you, Mr. Lorenzen.

The Court: They may be marked.

The Clerk: Defendant’s Exhibits AM and AM-1 in evidence.

(Thereupon the invoices of Money Back Smith were marked [1147] Defendant's Exhibits AM and AM-1 in evidence.)

(Witness excused.)

Mr. Lewis: Your Honor, we still have the problem of Mr. Lerman, and I have been trying to get a hold of him to see if he will come over, but by stipulation, if we have to take his deposition, we will take it tomorrow morning, but the Government can proceed with their case at the present time.

Mr. Drewes: If your Honor please, at this time the Government has one or two motions which it would like to address to the Court. However, there are other problems concerning other evidentiary problems that we would also like to discuss with the Court, which I had planned on doing at the noon recess, and I wonder if we might reserve our motions until that time in the interests of expediting the trial.

The Court: All motions are reserved. We might take our adjournment a little earlier, say a quarter to 12, and I will discuss with you the matters at hand, whatever they are.

Mr. Drewes: Very well.

The Court: How long will they take, 15 or 20 minutes?

Mr. Drewes: 15 or 20 minutes. We have a matter of the introduction of evidence of a rather complicated nature that I would like to discuss with the Court.

Mr. Shelton: Mr. Whiteside will you take the stand, [1148] please?

MELBOURNE C. WHITESIDE

called by the Government, sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the Jury.

A. Melbourne C. Whiteside. I am a special agent in the Intelligence Division of the Bureau of Internal Revenue.

Q. Your address?

A. 32 Lindbergh Street, San Mateo, California.

Direct Examination

By Mr. Shelton:

Q. Mr. Whiteside, you have previously stated that you were the special agent who was in charge of this investigation by the Bureau?

A. Yes, sir.

Q. You will recall that a few days back that His Honor expressed an interest in some information with respect to purchases based on the sailor suits purchased by the defendant during the years 1944, '45 and '46.

A. Yes, that's correct.

Q. And was it last Monday that the Government agents, together with Mr. Hellman, came in here and did some work on the purchase records in the form of invoices produced by the defendant?

A. Yes, sir, that's correct. [1149]

(Testimony of Melbourne C. Whiteside.)

Q. Do you have there some work sheets which summarizes the work done at that time?

A. Yes, these are carbons. At the time Mr. Hellman brought in the purchase invoices I went through each invoice, picked out those which indicated purchase of sailor suits, called them off to Mr. Hellman, and he made a tabulation, and a carbon copy was made which was given to me.

Q. Do I understand that those working papers are in Mr. Hellman's writing?

A. That is correct.

Q. Will you please tell the Court and the ladies and gentlemen of the jury what that summary shows with respect to sailor suit purchases with respect to the year 1944, that is, sailor suit purchases by the Army & Navy Store?

Mr. Hagerty: Well, just a minute. I will object to that question and ask that the examination proceed in the normal manner and that he should be directly questioned and make an answer rather than testifying from some exhibit that we haven't seen.

The Court: Well, you might glance at it. This is just to facilitate the examination. That is a summary, is it?

A. Yes, sir, they have the original. This is a copy.

Mr. Shelton: Your Honor, may the witness answer the question?

The Court: Answer the question, please. [1150]

(Testimony of Melbourne C. Whiteside.)

A. For the year 1944 we found that Mr. Olender had purchased 259 suits at a cost of \$6,713.50. Those, of course, did not include the \$20,550 Goodman——

The Court: 1944, 259 at the cost of——

A. \$6,713.50.

The Court: And the average price?

A. The price is, for the most part, appears to be about \$26.50. We did not work out an average.

Q. (By Mr. Shelton): Mr. Whiteside, in connection with this Schedule that has been prepared, I understand that it was prepared from such records as were brought in by the defendant and that you had no opportunity to make any independent search as to whether those records were complete? A. No, we accepted——

Mr. Hagerty: If your Honor please, this is leading and suggestive. I think it is an extemporaneous statement to the jury by the counsel. I am going to object to that. I will withdraw my prior objection as to the statement that I didn't know about this. But statements that are really declaratory, like this, like the one just made by Mr. Shelton, I am going to object to, though, that form of interrogation.

The Court: It is objectionable on that basis.

Mr. Shelton: All right.

Q. Mr. Whiteside, from what invoices was that schedule prepared? [1151]

(Testimony of Melbourne C. Whiteside.)

A. It was prepared from invoices which were produced by Mr. Hellman.

Q. And will you state whether or not you went over to the defendant's place of business to make any check as to whether all invoices were produced?

A. No, I did not go to his place of business—that is, this past week.

Q. Will you state whether or not you accepted for the purpose of this schedule such invoices as were produced here at the Court chambers by Mr. Hellman? A. That is correct.

Q. All right. Then for the year 1945, Mr. Whiteside, according to the working papers there, how many sailor suits were purchased by the Army & Navy Store?

A. In the year 1945 there were 1,578 suits purchased at a total cost of \$35,656.

Q. Will you give the comparable figures for the year 1946 from the schedule?

A. The year 1946 he purchased 385 suits at a total cost of \$9,452.

Q. Mr. Whiteside, will you state whether any check was made to determine whether these particular invoices went into the record of the defendant's books? Was any such check made by you or did you just analyze the invoices as produced?

A. I did not check these, each item, back to the books. [1152] There were certain ones we did look at and they were recorded.

Q. The ones which you checked were recorded?

A. That's correct.

(Testimony of Melbourne C. Whiteside.)

Q. Mr. Whiteside, did you make any attempt to determine from the invoices produced the sizes of sailor suits purchased by the Army & Navy Store during the years 1944 to 1946?

A. The invoices did not show sizes. There may be one exception. I notice on March the 8th, 1946, Dewey Sales showed—we have the figures thirty 37's, thirty-five 38's, twenty 39's, fifteen 40's. I presume those would be the sizes shown on the invoices.

Q. Aside from that one invoice, Mr. Whiteside, was there any indication on any of the sailor suit invoices as to the sizes of the suits?

A. No, sir, there was not.

Q. Now, Mr. Whiteside, during your investigation I will ask you whether or not aside from the Lerman suits, the invoices for which are in this record, you were able to determine the sizes of any of the sailor suits purchased by the Army & Navy Store or Milton Olender during the years 1944 to 1946, inclusive?

Mr. Hagerty: Object to the question as being leading and suggestive.

The Court: Overruled.

A. No, we could find no such records.

Q. Will you state whether or not, to the extent available, [1153] you did examine the records of persons selling sailor suits to Olender during those years, and persons to whom Olender sold sailor suits during those years?

A. During the year 1944 the majority of these

(Testimony of Melbourne C. Whiteside.)

suits were purchased by Mr. Olender from Dorfman Hat. We attempted to get a record from Dorfman Hat Company as to sizes. They had no such record.

We also checked the Goodman records and we could find no record of sizes.

Q. Mr. Whiteside, can you tell me the approximate month when you checked those Dorfman records to see if you could determine sizes?

A. It would have been in the early part of the investigation. I would offhand say it would have been in October or the early part of November, 1948.

Q. And approximately what month did you make the attempt to determine the sizes of sailor suits purchased from George Goodman?

A. That would have been recently—prior to the time the trial started.

Q. Mr. Whiteside, there has been some testimony in this trial about purchases of sailor suits by the Army & Navy Store or Olender which did not go into the books. I will ask you whether in checking these invoices that were produced here in Court, so far as your check went, you found any of [1154] those invoices that were not recorded in the defendant's books?

A. Are you referring to the \$20,550—

Q. Those or any other purchases that may have been made outside the books, Mr. Whiteside?

A. No, I don't recall finding the others.

(Testimony of Melbourne C. Whiteside.)

Q. Mr. Whiteside, during the course of your investigation did Mr. Olender at any time give you any invoices evidencing the purchase by him of sailor suits? A. No, sir.

Q. Mr. Whiteside, I will show you the last page here of Government's Exhibit No. 25 for identification, which relates to six items, and the heading on that schedule is the following: "Withdrawals from savings account in Fresno."

Now I believe that it is established in this record that this schedule was part of the work done by the accountant Ringo for the taxpayer.

A. That is correct.

Q. I will ask you whether or not this schedule which I show you was a part of a sworn statement of assets and liabilities which was submitted by the defendant to the Bureau of Internal Revenue during the course of your investigation?

A. It was submitted to Mr. Root just prior to the time I came into the investigation.

Mr. Hagerty: Objected to as hearsay, your Honor.

The Court: Overruled. [1155]

Q. (By Mr. Shelton): Mr. Whiteside, I will ask you whether or not you made a check or verification as to many of the items contained in what is now Government's Exhibit 25 for identification?

A. I did, yes.

Q. With specific reference to the six items that I have referred to before on the last page of this

(Testimony of Melbourne C. Whiteside.)

schedule, I will ask you what, if anything, you did in an effort to check or verify those items?

A. Well, our first step was to go to the bank in Fresno.

Q. Which bank was that?

A. The Bank of America. And locate the account of Mrs. Olender—I think the account was number 3941.

Q. Was that Mrs. Mollie Olender, Mr. Whiteside? A. Mrs. Mollie Olender, yes.

Q. What relation was she to the defendant?

A. The defendant's mother.

Q. After you located that account, Mr. Whiteside, what did you do?

A. Well, we went through all the withdrawal slips to try and trace the funds from the withdrawals as shown on that—in that schedule, to see whether or not the money left the bank and was in fact transmitted to the defendant, and we found that most of them were transferred to other [1156] accounts.

Q. Well, without telling what most of them—Mr. Whiteside, let's see if we can take them item by item. There are six of these are there not?

A. That's correct.

Q. All right. Can we take the first item under date of February 3, 1942, in the amount of \$1,000, did you attempt to verify what happened to that money? A. Yes, sir, I did.

(Testimony of Melbourne C. Whiteside.)

Q. What did your investigation show happened to it?

A. It went in one of the other accounts. I would have to refer to the Exhibit to give you the correct—Do you have the Fresno Exhibits from the bank account?

Q. All right. Showing you now, Mr. Whiteside, Government's Exhibit number 52, which is records produced by the Bank of America, Fresno, and Government Exhibit 53, which is records produced by the Security First National Bank of Los Angeles, Fresno branch. I will ask you what your investigation showed as to the disposition of the \$1,000 item on February 3, 1942.

Mr. Hagerty: Well, if your Honor please, I will object on the grounds, just in the interests of time, the record speaks for itself. We have the testimony of the bank men here as to these transactions.

The Court: Overruled.

A. What was the first date you gave me, Mr. Shelton? [1157]

Q. (By Mr. Shelton): February 3, 1942.

A. That was deposited into another savings account, withdrawn and deposited in savings account number 2146. That was in the name of Mrs. J. Olender. [1157A]

Q. I will ask you what other name Mrs. Mollie Olender used? A. Mrs. J.—Julius Olender.

Q. I will ask you whether or not the bank rec-

(Testimony of Melbourne C. Whiteside.)

ords show that the transfer in question was made directly from the one account to the other.

A. Yes, sir, it does.

Q. I will now ask you, Mr. Whiteside, about the second item which is March 31, 1943, in the amount of \$1,000, and ask you what your investigation showed as to that item?

A. That was deposited into the commercial account of Mrs. J. Olender on March 31. It was a transfer between the accounts.

Q. I will ask you, in the third place, concerning an item on January 6, 1944, in the amount of \$2,000?

A. On January 6, 1944, there is a transfer from Mrs. Mollie Olender's account to the account of Terrys, Olender, Gambor. That is number 126. It was again a transfer between accounts.

Q. And Mrs. Gambor is the sister of the defendant? A. That is correct.

Q. I will ask you about an item of \$2,500 on July 5, 1944.

A. That was a withdrawal from the Security First National Bank, Fresno branch, revenue agent Root and I called at that bank and they could not locate the withdrawal slip for that. [1158]

Q. Well, now, will you state from what account the \$2,500 was originally drawn, that is the account in whose name?

A. That was the account in the name of Molly Olender, the account number 59810.

Q. You could not determine then where that money went? A. No, sir.

(Testimony of Melbourne C. Whiteside.)

Q. I will ask you next about an item of \$1,000 under date of December 15, 1944.

A. On December 15, 1944, there was a transfer from the savings account 3941 to Mrs. J. Olender's commercial account.

Q. I will ask you finally, Mr. Whiteside, about an item of \$3,000 under date of January 2, 1945?

A. That was a transfer to the account number 126 in the name of Terrys, Olender, Gambor.

Q. All right. Now, Mr. Whiteside, summarizing these six accounts I will ask you whether or not all of the six withdrawals were made from one account or another account in the name of the taxpayer's mother, Mrs. Mollie Olender or Mrs. Julius Olender?

A. That is correct.

Q. Of the five transfers that can be accounted for, I will ask you how many of those five were to accounts of Mrs. Mollie Olender? [1159]

A. Three of them.

Q. And to whom were the other two transfers, to what accounts?

A. To Terrys, Olender, Gambor.

Q. And in summary of the five transfers you were able to trace, three went to the accounts of Mrs. Mollie Olender and two went to the accounts——

Mr. Hagerty: If your Honor please, I am going to object to the declarations by the counsel when he is interrogating a witness.

The Court: You will have to ask the witness.

(Testimony of Melbourne C. Whiteside.)

Mr. Hagerty: He is summarizing testimony. It is too early for argument.

Mr. Shelton: It is a summary.

The Court: You might ask the witness the summary.

Mr. Shelton: Well, in summary then, Mr. Whiteside, to what accounts did the five accounts go?

A. Well, three went to accounts of Mrs. Olender, one of them—which was the same account, two in her commercial account. The other two, which were traced, went to the account of his sister.

Q. Mr. Whiteside, I will show you Defendant's Exhibit AC, which is a ledger account of the bank account—ledger record of the bank account of Olender, and Defendant's Exhibit AE, which is a series of checks drawn on the same bank account of Milton Olender, a personal bank account. [1160] I will ask you whether or not after those two Exhibits were introduced in evidence you made a tabulation to determine on the basis of the ledger account how many of the personal checks of the defendant in the years 1944 and '45 were not produced here in court?

A. There were 14 of the 1944 checks and three of the 1945 checks not produced or not included in this pile.

Q. Now I will ask you whether or not during the course of your investigation, Mr. Whiteside, you made an attempt to obtain the personal checks of the defendant for the years 1944 and 45?

(Testimony of Melbourne C. Whiteside.)

A. Yes, we made repeated requests through Mr. Ringo.

Q. And I will ask you to what extent you were shown during the investigation checks for the years 1944, 1945, which are now part of that Exhibit before you?

A. Well, there are a few, very few checks which Mr. Ringo obtained from Mr. Olender, some of the larger checks with which he bought stock or paid his insurance premiums, I believe is one of them, some bonds. The checks relating to mostly the personal items, expenditures for personal items, were not produced. We have no records of those at all.

Q. Mr. Whiteside, there has been some testimony in this record with respect to \$5,000 worth of sailor suits purchased from one Levy by one Lerman. I will ask you whether or not during the course of your investigation you [1161] gave attention to that purchase? A. Yes, we did.

Q. I will ask you whether or not during the course of your investigation you had access to original photostatic copies of nine cashier's checks in the amount of \$20,550 paid by the defendant to George Goodman? A. • Yes, we have them.

The Court: Counsel, before we take up that item, and particularly in reference to the checks we might address ourselves to the suggestion made by your co-counsel.

Mr. Shelton: Yes, your Honor.

(Testimony of Melbourne C. Whiteside.)

The Court: Recess the jury until two o'clock this afternoon, with the same admonition not to discuss the case and form an opinion.

(Thereupon out of the presence of the jury, motion to strike by the Government, those items contained on defendant's schedule 4: 1944 transfers to personal bank account \$100, \$400, \$1,500; transfer to personal bank account \$300; transfer to Olender-Elkus account \$1,500; 1945, June 9, transfer to personal bank account, \$500; \$522; November, 1945, four items totaling \$2,500; 1946, May 1st, transfer to personal account \$6,000; Olender McGrete account \$5,000; Olender-Elkus bank account \$1,700, and all other items down to December 20, \$1,500, with the exception of \$1,000 to W. and J. Sloane. Motion to strike denied.)

(Adjournment taken until two o'clock [1162] p.m.)

Monday, October 6, 1952, 2:00 P.M.

MELBOURNE C. WHITESIDE

resumed the stand, having been previously sworn, was examined and testified further as follows:

Direct Examination
(Resumed)

By Mr. Shelton:

Q. Mr. Whiteside, just before the recess I had invited your attention to nine cashier's checks to George Goodman in the amount of \$20,550 purchased in June, 1944, and to \$5,000 in sailor suits purchased by Morris Lerman in 1945—I believe about the month of June. Now in the course of your investigation will you state whether or not you made any effort to determine whether there was any tie-in between the \$20,550 of cashier's checks and the \$5,000 Lerman purchase?

A. Yes, we made that—I made an attempt to determine that.

Q. And by "we" will you state whether or not you mean yourself and revenue agent Root?

A. That is correct.

Q. Will you tell the court and the jury the results of your efforts to determine whether there was any tie-in between the \$20,550 of cashier's checks and the \$5,000 Lerman purchase in the next year?

Mr. Hagerty: If your Honor please, I will ob-

(Testimony of Melbourne C. Whiteside.)

ject to the question as calling for the conclusion and opinion of [1163] this witness and attempting to usurp the function of the jury. He can ask him what he found and what he did, but to put a conclusion in the evidence like that I think surely invades the province of the jury.

Mr. Shelton: It was a double question in the form of whether or not.

The Court: Well, these men are called as experts and as such they can give their opinions based upon the evidence. As I indicated to the jury at the outset of the case, whether a man be called as a Government witness or as a defense witness, his testimony is to be viewed in the same light, with the same test of credibility, and the fact that a man may be called as a Government witness is not to receive any greater consideration at your hands or any less. They are all equals in the eyes of the jury and in the eyes of the Court. Being experts on any subject, there is an exception to the time-worn rule. The exception is that an expert may give his conclusions based upon the evidence and the facts as he views them. Now the other side may express their conclusions the same way.

Accordingly the objection is overruled.

A. We were unable to find any evidence whatsoever to indicate that these suits sold in 1945 had any bearing on the purchase in 1944, that is, the Goodman suits. [1164]

Q. (By Mr. Shelton): Mr. Whiteside, before

(Testimony of Melbourne C. Whiteside.)

the recess you gave some testimony with respect to some purchase schedules which were prepared by you and Mr. Root and Mr. Hellman, did you not?

A. That is correct, yes.

Q. I will ask you again to refer to the 1945 schedule, Mr. Whiteside, and to state how many sailor suits were purchased by Milton Olender in the first six months of 1945, according to the information contained in that schedule?

A. In the first six months there were only 22 suits purchased.

Q. I will also ask you to read the purchases in the last six months of the year according to that schedule?

A. On July 31, Mr. Olender purchased from M. Saraga 951 suits at \$25, total amount \$23,775.

On August 28th he purchased 500 suits from Sea-going Uniform Company at \$18 per suit for a total amount of \$9,000.

On November 6th he purchased 105 suits from Joe Asman at \$22 per suit, totaling \$2,310.

Mr. Shelton: The Government will, at this time, offer in evidence as its Exhibit next in order a schedule of sailor suit purchases for the years 1944, '45, '46 in the handwriting of Mr. Hellman. [1165]

The Court: It may be marked.

The Clerk: U. S. Exhibit Number 54 in evidence.

(Thereupon handwritten schedule relative to purchase of sailor suits received in evidence and marked U. S. Exhibit 54 in evidence.)

(Testimony of Melbourne C. Whiteside.)

Q. By Mr. Shelton): Mr. Whiteside, before the recess I had asked you concerning those six items relating to withdrawals from Mrs. Mollie Olender's bank account in Fresno. I will ask you whether or not in connection with the five transfers you are able to trace you looked at the transferee accounts to see whether there were withdrawals from those accounts through the close of the year 1946?

A. Yes, we check that. [1166]

Q. And what did you find with respect to those five transfer accounts as to whether there had been withdrawals between the times the money passed to the transfer accounts and the end of the calendar year, 1946?

Mr. Hagerty: If your Honor please, I will object to this as not being the best evidence. The matter is of record.

The Court: Overruled. You can state your summation from the record.

Mr. Shelton: And may the record show that he has Exhibits 52 and 53 to testify from, that is Government Exhibits.

A. The money which was transferred into the account of Terrys, Olender, Gambor, savings account number 126, remained in that account. There was no withdrawal at all at any time. In fact the money is still there.

On account number 2146, in the name of Mrs. J. Olender, which received one of the transfers in the amount of \$1,000, there are some small withdrawals

(Testimony of Melbourne C. Whiteside.)

but none in the amount of \$1,000 for a period of approximately two months later. Later there is a \$1,000 withdrawal.

In the commercial account there are no amounts which could be—no similar amounts which could be deemed to have been a transfer out of the [1167] account.

Q. Now, Mr. Whiteside, in connection with these six items that I questioned you about, that is, the withdrawals from this Fresno bank account of Mrs. Mollie Olender, in checking on the schedule on the last page of Exhibit 25 for identification, will you state whether you did anything else except checking the bank records? A. Yes, we did.

Q. Will you state whether or not you discussed with anyone this matter? A. Yes.

Q. With whom did you discuss this matter?

A. With Mrs. Mollie Olender.

Q. And about what month was that discussion held?

A. We talked to her on two occasions, on November 17 and November 18, 1948.

Q. Now, Mr. Whiteside, as a result of your checking the bank records in Fresno here in evidence and as a result of your discussions with Mrs. Mollie Olender, I will ask you whether or not, for the purposes of your report, you made a determination as to whether the six items represent gifts which were made by Milton Olender—strike that—which were made by Mrs. Mollie Olender to her son Milton?

(Testimony of Melbourne C. Whiteside.)

Mr. Hagerty: Well, if your Honor please, again we will enter an objection. The question is both leading and [1168] suggestive. It also is again calling for the conclusion and opinion of the witness, and partially based on hearsay.

The Court: Overruled.

A. Yes, we made a determination on that.

Q. (By Mr. Shelton): What was that determination?

Mr. Hagerty: We enter the same objection, your Honor.

The Court: Overruled.

A. Our determination was that the gifts were not in fact made.

Mr. Shelton: You may examine.

Cross-Examination

By Mr. Lewis:

Q. Mr. Whiteside, relative to the last question asked you by Mr. Shelton, did you not procure an affidavit from Mollie Olender?

A. No, sir.

Q. Did you, Mr. Root and Mr. Hellman examine all the invoices for 1944 and check them all against the purchase register?

A. The 1944—yes, sir, we went through that entire year.

Q. How many did you find missing?

A. I don't recall the actual count. They were substantially correct.

(Testimony of Melbourne C. Whiteside.)

Q. Did you make the same check for the years 1944 and 1946? [1169] A. No, sir.

Q. Why?

A. It was a matter of time, Mr. Lewis.

Q. Didn't you state at that time that inasmuch as 1944 was proved correct it was deemed unnecessary to verify 1945 and 1946?

A. That was one of the factors considered. The main factor, I would say, was the time of day. It would have taken several more hours to check those out.

Q. In any event did you find any invoices missing pertaining to sailor suits for the years 1945 and 1946?

A. I wouldn't know if they were missing. I wouldn't know what they pertained to.

Q. Mr. Whiteside, I show you U. S. Exhibit 25 for identification, U. S. Exhibit number 26 and U. S. Exhibit number 45. In the course of your investigation did you check the U. S. Exhibit number 25 for accuracy? A. Yes, sir.

Q. Did you check the item on that Exhibit number 3, page 1, personal check 5/10/45 to J. C. Penney Company?

A. What page is that, Mr. Lewis?

Q. It is on page 1, Exhibit 3 of that.

A. Yes, I believe that is one of the checks that Mr. Ringo produced, the thousand dollar check to J. C. Penney Company.

Q. Well, doesn't that show that that was a per-

(Testimony of Melbourne C. Whiteside.)

sonal check [1170] on Exhibit 3, page 1, for the purpose of purchasing the bonds listed 1956 to 1959? A. Yes, that is what it states.

Q. I hand you herewith CCH, Commerce Clearing House, about Government bonds, page 2133. You are familiar with that volume, aren't you?

A. I am familiar with the service. I don't know if I have looked at this particular page.

Q. What is the date that they were issued?

A. It shows the date issued February 1, 1944.

Q. Then did you rely on schedule three in making up your figures for the net worth computation?

A. No, sir, in checking these bond purchases we found that he had offered the wrong explanation as to how they were acquired. The bonds, I believe, were acquired—were on hand but not acquired as he explained them.

Q. Now directing your attention to Exhibit 26 there. The dates alleged therein to be the dates of the Goodman purchases. Are all of those dates after May 5, 1944? A. On Exhibit 26?

Q. Yes, the dates of the deliveries of the Goodman purchases?

A. I see no dates of delivery on this one, sir.

Q. Maybe this other Exhibit. Yes. It's Exhibit 45—goods received as follows— [1171]

Mr. Drewes: I will object to that question, your Honor. That Exhibit was put into evidence with respect to item number 19 only.

(Testimony of Melbourne C. Whiteside.)

The Court: What is the precise question?

Mr. Lewis: I was asking him to identify the dates of the deliveries of the Goodman purchases appearing on the Government Exhibit. They put it in for number 19. I may put it in for something else if he answers the question.

Mr. Drewes: I don't believe the witness testified that the document was made——

The Court: You may examine him.

Q. (By Mr. Lewis): What is that document?

A. This is a photostat of one of the pages of Mr. Ringo's work papers.

Q. You procured those from Mr. Ringo?

A. That is correct.

Q. In the course of your investigation?

A. Yes.

Q. Directing your attention to the dates of the deliveries, Goodman purchases. Who furnished those figures there to Mr. Ringo, the dates?

Mr. Shelton: Objected to, if your Honor please, on the grounds it calls for hearsay, not within the knowledge of this witness. [1172]

The Court: Well, if he hasn't any knowledge, he may testify. I can't anticipate.

A. I would have to presume that Mr. Ringo got them from Mr. Olender.

Q. (By Mr. Lewis): Did he not get them from Mr. Root? A. Not to my knowledge.

Q. All right. Take Exhibit 45. Directing your attention to the first line, cash in vaults. Read the year and balances there.

(Testimony of Melbourne C. Whiteside.)

A. What Exhibit, Mr. Lewis?

Q. '45.

A. That doesn't appear in Exhibit 45.

Mr. Drewes: Comparative balance sheet.

Mr. Lewis: Comparative balance sheet.

A. Exhibit 26.

Q. Exhibit 26.

Mr. Drewes: That is the one you referred to?

Mr. Lewis: Yes. No, Exhibit 45. The very item is right here.

A. Those are the decreases in the cash in vault items.

Mr. Lewis: Yes.

A. Is that what you want?

Q. Yes. And those are the figures that you used in making up your net worth computations?

A. That is correct. [1173]

Q. And is Exhibit 45 based upon your Exhibit 26, item 19, cash in vault?

Mr. Shelton: If your Honor please, those were separate exhibits from the work papers of the witness Ringo and I don't believe it is proper to ask this witness whether 45 derives from 26. They are Ringo's work papers and he was on the stand.

The Court: These are the work papers wherein Mr. Ringo has written in his own hand certain legends?

A. Yes.

The Court: I think the observation is correct.

(Testimony of Melbourne C. Whiteside.)

You are asking this man to interpret Mr. Ringo's work.

Mr. Lewis: No. I am asking him—what I intend to ask him is what he based his net worth computations on.

The Court: What Mr. Ringo did?

Mr. Lewis: What Mr. Whiteside did.

The Court: Oh, he may testify to that. Certainly. If this witness resorted, as he apparently did, to any of the work papers of Mr. Ringo, then he may testify as to the precise form and the nature of the foundation.

A. Well, our starting point on net worth of course, was the sworn net worth statements submitted by Mr. Olender. As a breakdown of the cash in vault, we used the information we obtained from Mr. Ringo. [1174]

The Court: What was the amount of that information?

A. Well, it showed disposition of the cash in vault, and Mr. Ringo had advised us that that was information supplied by Mr. Olender, and showed a decrease in 1943 of \$6,000, a decrease in 1944 of \$19,000, a decrease in 1945 of \$42,800, and a decrease in 1946 of \$7,200.

Q. (By Mr. Lewis): You knew during the course of your investigation of the defendant here that the cash that is in dispute here was held by the defendant in the safe deposit box and not in the vault and only during the time that the money

(Testimony of Melbourne C. Whiteside.)

was held by the defendant's father the money was in the vault, didn't you?

A. That's correct. It was in the safe deposit box during the years under investigation.

Q. And look at U. S. Exhibit 45 and U. S. Exhibit 26 and tell me whether or not these Exhibits don't even purport to reflect the disposition of defendant's cash in safe deposit box as distinguished from the original \$75,000 in the defendant's father's vault.

Mr. Shelton: If your Honor please, the Government will object to that as misleading; for this reason, the Government has in evidence as its Exhibit 24 the defendant's own sworn statement of cash as of December 31, 1941, and December 31, 1947. Now at the time those net worth statements were submitted to the Government they were sworn to as true, [1175] and the four diminutions of \$6,000, 19,000, 42,800, and \$7,200 account for the full difference, and for that reason the Government—the difference between \$75,000 and 0 on the taxpayer's own sworn net worth, for that reason the Government submits the question by Mr. Lewis is misleading.

The Court: You might revamp it, Mr. Lewis.

Q. (By Mr. Lewis): Well, calling attention to those two exhibits, Mr. Whiteside, Exhibit 26, item 19 of U. S. Exhibit 45, did you verify—you are a licensed public accountant. Did you verify that \$6,000 cash was used in 1943, \$19,000 in 1944, \$25,000 in 1945, and \$4,800 in 1946?

(Testimony of Melbourne C. Whiteside.)

Mr. Shelton: Mr. Lewis, those last two figures are wrong. Shouldn't the 1945 figure be \$42,800 and the 1946 figure \$7,200?

Mr. Lewis: I'll have to look at the exhibit. I am asking this from memory.

Mr. Shelton: All right.

Mr. Lewis: Yes. \$6,000 in 1943 decrease, \$19,000 in 1944, \$42,800 in 1945, and \$7,200 in 1946.

A. The only verification which was made was through Mr. Ringo, and the disposition of the cash as obtained from him. There was no other written record which we could locate.

Q. As a public accountant would you accept the purported [1176] disposition on its face and not take into account any additions to the funds, such as gifts, rental properties and so forth?

Mr. Shelton: If your Honor please, I will object to that question, on this ground, there is a difference between the ordinary type of thing which is acceptable and an—a legal admission against interest. Now the Government's position in this case is that the taxpayer's own admissions are these figures, being admissions against interest, are binding on him, and for that reason the question of public accounting practice is misleading in these premises.

Mr. Lewis: Will you read the question?

(Question read back by reporter.)

The Court: It might be confusing as phrased. I see the point of your question, but—

You understand that, do you?

(Testimony of Melbourne C. Whiteside.)

A. I believe.

The Court: All right. You may answer it then.

A. No, as a public accountant I wouldn't accept things of that sort.

Q. (By Mr. Lewis): Now, you have been in charge of this investigation since you first became affiliated with Mr. Root? In other words, under the Government procedure the special agent is actually the directing head of the investigation, isn't he?

A. That's correct. [1177]

Q. Did you at any time give an official notice before the bringing of this indictment of Mr. Olender as to what the Government claimed against him?

Mr. Shelton: Objected to, if your Honor please, on the ground that the question again is misleading. Before this case was submitted to a grand jury Mr. Lewis had the opportunity of a conference in the Bureau of Internal Revenue to discuss the matter of a recommendation for prosecution, and the Government will submit that the question of whether Mr. Whiteside notified Mr. Olender of the findings in the case is misleading and improper.

The Court: If it goes to administrative functions and whether or not there is an obligation on the part of Mr. Whiteside and the like, I will sustain the objection.

Q. (By Mr. Lewis): Did your office issue the ninety-day letter with the official determination?

Mr. Shelton: Objected to, because the 90-day

(Testimony of Melbourne C. Whiteside.)

letter was issued after the indictment was brought in this case and has no materiality on the issues of this trial, which are the criminal issues, and not the civil issues.

The Court: Sustained.

Q. (By Mr. Lewis): Were you familiar with the handwriting of Mrs. Mollie Olender?

A. No. I may have seen it once or twice but I couldn't say I am familiar with it. [1178]

Q. Didn't Mrs. Olender tell you during the course of your investigation that \$20,000 worth of bonds belonged to her?

A. I don't believe we asked her that question. I don't recall.

Q. You did not ask her that question. That is one of the largest items in this case.

A. I don't recall that particular point, Mr. Lewis.

Q. You can't remember asking her that question? Here, according to your own figures, you come out with \$73,000 of unreported—what you claimed to be unreported income, and during the course of your investigation you didn't ask Mrs. Olender about the \$20,000 worth of bonds?

A. I say we may have asked her. I don't recall at this time.

Q. Have you ever seen the handwriting of Mrs. Olender, Mrs. Mollie Olender?

A. I think I have seen her signature but that is about all.

(Testimony of Melbourne C. Whiteside.)

Q. Have you examined all the records in the bank concerning Mrs. Olender? Didn't you?

A. Yes, sir.

Q. Are you able to identify her handwriting?

A. No, sir, not just from a signature card. That would be the only handwriting in the bank. [1179]

Q. Would it refresh your memory concerning the questions about the \$20,000 bonds if on the date right after you interviewed her she stated—

Mr. Shelton: Mr. Lewis, can you fix the interview a little more definitely? It is indefinite, I think.

Mr. Lewis: He knows the date that he was down there.

Mr. Shelton: He interviewed her twice, as I recall his direct testimony. Do you mean the first or the second interview?

Mr. Lewis: Either of the interviews.

Q. That she wrote to Mr. Olender and explained you had asked about the bonds, either you or Mr. Root?

Mr. Shelton: Objected to, if your Honor please. This is an attempt to introduce a hearsay matter to refresh recollection on something which is not shown to have been brought to the attention of this witness.

Mr. Lewis: Your Honor, I think here we have a trained investigator of the United States Government. He has been in the service quite some number of years, and I think I have got a right to find out from this witness whether or not he did

(Testimony of Melbourne C. Whiteside.)

ask her about those bonds and try to refresh his recollection because it is inconceivable to me that he wouldn't have asked a woman what he had right on these Exhibits——

The Court: Counsel, the sum of what you've said might [1180] well be reserved to an argument hereafter, and you don't want to make all your arguments at once. But I think it is a pertinent question as to what this gentleman asked any particular witness about any particular item. I will overrule the objection. If he has any recollection, if he has any memory or the like, he may answer.

A. What was the question, Mr. Lewis?

Q. (By Mr. Lewis): Did you or did you not talk to Mrs. Mollie Olender about those \$20,000 bonds?

A. Well, my answer that I gave you a few minutes ago, I stated I did not recall talking to her about those particular bonds. I may have. We talked to her two evenings and we covered many subjects.

Q. But you don't remember the biggest single item in which she was involved?

A. The biggest single item was at that time these alleged gifts.

Mr. Lewis: You may have the witness.

(Testimony of Melbourne C. Whiteside.)

Redirect Examination

By Mr. Shelton:

Q. Mr. Whiteside, Mr. Lewis asked you on cross-examination whether you had made an examination of the correctness of Government's Exhibit number 25 for identification, did he not?

A. That is correct.

Q. In that connection I will ask you whether or not you [1181] made a determination that Mrs. Betty Olender's bank account in the amount of \$10,000 was omitted from Government Exhibit 25 for identification.

Mr. Hagerty: Well, if your Honor please, I will object to that as leading and suggestive.

The Court: Overruled.

A. Yes, the account of Mrs. Olender had been omitted from the sworn net worth statement.

Q. (By Mr. Shelton): I will ask you whether or not there was an occasion of a conference on that item at which time were present Mr. Monroe Friedman, revenue agent Root, the defendant and yourself?

A. Yes, we had such a conference on October 18th.

Q. What year? A. 1948.

Q. And where did that conference take place?

A. In Mr. Root's office in Oakland.

Q. That is the Internal Revenue agent's office?

A. Yes, sir.

(Testimony of Melbourne C. Whiteside.)

Q. And I will ask you whether or not at that time, Mr. Olender stated an explanation concerning the omission of that \$10,000 bank account from what is now Government's Exhibits for identification?

A. He didn't give a complete explanation. He said that his wife had inherited \$3,000 from her mother and the [1182] deposit—or a portion of the deposits represented that money. He didn't explain the balance.

Q. Did he give the name of the wife's mother?

A. No, I don't believe he gave it at that time. We later determined it.

Q. And what did you later determine the wife's mother was named?

A. Mrs. Laura J. Foote.

Q. Mr. Whiteside, I would like to read you from page 461 of the transcript in this case, which is the testimony of Milton Olender, as follows:

“Q. Mr. Olender, you testified this morning that you received from your mother-in-law, Mrs. Foote, the sum of \$2,500? A. That is right.

“Q. When did you receive that money?

“A. In 1945.

“Q. Why was that money given to you by Mrs. Foote? A. For a very specific purpose.

“Q. I recall you so testifying this morning. What was the purpose?

“A. For her grandson to purchase his home with.

(Testimony of Melbourne C. Whiteside.)

“Q. And how long did you hold that \$2,500?”

“A. Oh, a few months after she passed away.

“Q. When was that? [1183]

“A. She passed away in August of 1945.”

I will ask you whether or not in the course of the conference that I referred to before you heard anything whatsoever about a \$2,500 gift for the purpose of a home for the grandson?

A. No, sir, we did not.

Q. I will ask you whether or not you ever heard such an explanation prior to the time given on the stand in this case?

A. No, sir, I never heard that before.

Q. Mr. Whiteside, at the two times that you conferred with Mrs. Mollie Olender what did she tell you about the deposits and withdrawals from the bank accounts in Fresno?

A. We were attempting——

Mr. Hagerty: If your Honor please, this calls for hearsay.

The Court: Overruled.

A. We were attempting to determine whether or not other cash had been available to make these gifts. Mrs. Olender told us it had been her practice to deposit all her receipts in the bank and withdraw it from the bank as she needed.

Mr. Shelton: You may examine.

Mr. Hagerty: If your Honor please, I would like to renew the objection and ask the jury be instructed to disregard that testimony, that that testi-

(Testimony of Melbourne C. Whiteside.)

mony be stricken [1184] from the record. We have no way of combatting. The grave has sealed that woman's lips. We can't bring her back to deny or to give her version of what she told this witness, and we are just stuck with his statement, which is purely hearsay.

The Court: Well, is it not true that other questions were directed to this witness bearing upon the same situation?

Mr. Hagerty: But his memory failed him as to the conversations that were had.

The Court: I thought that the avenues were opened then. May I have the answer again by this witness?

(Answer read back by reporter.)

Mr. Shelton: If your Honor please, the Government is agreeable to withdrawing the question and the answer.

The Court: That may go out.

Mr. Shelton: And request the jury be instructed to disregard it.

The Court: The jury is instructed to disregard it.

Mr. Shelton: In its place the Government will ask the following question:

Q. In connection with your investigation, Mr. Whiteside, were you able to determine any other bank accounts of Mrs. Mollie Olender, except the bank accounts covered in Government's [1185] Exhibits 52 and 53—in other words, the bank accounts

(Testimony of Melbourne C. Whiteside.)

in the Bank of America at Fresno and, what is that, the Security First National?

A. Yes, sir. Those are the only two banks that we found accounts open.

Q. And you found only the savings and commercial accounts of Mrs. Mollie Olender which I related to or included in Government's Exhibits 52 and 53?

A. That is correct.

Mr. Shelton: You may examine.

Recross-Examination

By Mr. Lewis:

Q. Did you check any bank accounts of Mrs. Olender in Los Angeles?

A. Yes, sir.

Q. Did you find any?

A. We found one which was closed out, to the Fresno branch of the Security First National.

Q. And you still do not remember asking her about the \$20,000 worth of bonds?

Mr. Drewes: Objected to as asked and answered, your Honor.

The Court: Sustained.

Mr. Lewis: That is all.

Mr. Drewes: That is all.

(Witness excused.) [1186]

DONALD A. JENSEN

called as a witness for the Government, sworn.

Mr. Hagerty: At this junction, if your Honor please, I had spoken before to counsel in reference to the leases covering the Fresno properties, and some checks covering partial payment of expenses.

Mr. Drewes: We have no objection to the introduction of the checks, your Honor. The leases appear to be immaterial, irrelevant.

Mr. Hagerty: We would offer the checks in evidence, your Honor, and also the leases as showing the distribution of the rents from the property as being made in the fractional method to the various heirs as testified to on the stand by the defendant.

Mr. Drewes: We would have no objection to the leases, if they had any probative force in that direction, but they appear not to have, your Honor.

The Court: Counsel brings the leases in in connection with the proration of those rents?

Mr. Hagerty: Yes.

The Court: I will allow it.

The Clerk: Defendant's Exhibits AN and AO in evidence.

(Thereupon the leases were marked Defendant's Exhibit AN in evidence and the checks AO in evidence.)

The Clerk: Please state your name, your address and [1187] your professional calling to the Court and to the jury.

A. I am Donald A. Jensen, director of the Fresno County Department of Public Welfare. I

(Testimony of Donald A. Jensen.)

reside at 4505 Madison Street in Fresno, California.

Mr. Hagerty: Might I suggest, counsel, at this time, as I understand the purpose of the Government is to introduce or to offer into evidence certain records which may or may not be admissible, and to guard against error in the record, might I suggest that we present our side of the position in reference to the admissibility then in the absence of the jury, and since it is close to the time for the afternoon recess, might we do that now?

The Court: All right. I have no objection.

The jury is excused for the afternoon recess, and take a brief recess with the same admonition, ladies and gentlemen.

(Following proceedings outside the presence of the jury):

Mr. Hagerty: As I understand the Government's position, the Government seeks to offer into evidence at this time certain affidavits in reference to the procurement of an old age pension for Mrs. Foote.

The Court: This matter was referred to previously in our colloquy concerning the admissibility of the affidavits, as well as the affidavit submitted by Mrs. Olender. [1188]

Mr. Hagerty: As I take it, and I believe I'm right—Mr. Drewes, you tell me—

Mr. Drewes: I will make a statement. There are in these files a number of form replies from various banks, your Honor, public welfare, Fresno, the

(Testimony of Donald A. Jensen.)

earliest one is 1939 through 1942, by which we seek to establish that Laura Foote had no cash in banks over that period of time. You will recall defendant's testimony that he received \$2,500 from Mrs. Foote which she had saved over a long period of time. There are also a number of reports reflecting much the same thing, which are filled out by the various investigators, as I take it, social workers from that department, in which successive dates are shown the assets of Mrs. Foote. It goes to the same point. And there is finally the affidavit of Mrs. Betty Olender, which is dated in May of 1939, in which she states that she has no cash in banks and no cash in—I think specifically in safe deposit boxes.

Your Honor will doubtlessly recall the defendant also testified that the gifts made over the ten-year period were made to himself and to his wife jointly. That, of course, goes to impeach that testimony. There is the purpose of the showing.

Mr. Hagerty: Well, if your Honor please, of course it is perfectly conceivable that a gift could be made to the [1189] husband and the wife not have knowledge of it.

Mr. Shelton: That is a matter of rebuttal evidence, if your Honor please.

Mr. Hagerty: But this covers a period of time prior to the indictment, 1939, and in the year 1943, by one of these records itself, February, 1943, the old age pension was discontinued as relatives assumed all the responsibility as of February 23, 1943,

(Testimony of Donald A. Jensen.)

which antedates the inquiry that we are concerned with here, 1945 and '46.

Mr. Drewes: There is no question but that these documents pertain to a period which antedates the indictment. However, they are material to the issues which I have just stated as to what happened between 1930 and 1940 by the defendant's own testimony.

The Court: During the years——

Mr. Drewes: When these gifts were——

The Court: ——were accumulating or allegedly accumulating.

Mr. Drewes: And also the \$2,500 which she allegedly accumulated over the period of years by his testimony.

Mr. Hagerty: The defendant has testified here that even his sister didn't know of these gifts during the period of time that it was going on.

Mr. Drewes: Well, those are out of the record, your Honor.

Mr. Hagerty: No, they are not. [1190]

Mr. Drewes: Those are matters to be rebutted.

Mr. Hagerty: It was on the record, the testimony of the defendant.

The Court: I think the documents are relevant.

Mr. Hagerty: I think that they are collateral impeachment, your Honor, at best, because there is not any affidavit there of the defendant.

(Further argument and discussion concerning the records of the Department of Public Welfare, Fresno County.)

(Testimony of Donald A. Jensen.)

The Court: The objection will be overruled.

(The following proceedings had in the presence of the jury):

Q. (By Mr. Drewes): Mr. Jensen, you are the director of the Fresno County Department of Public Welfare? A. I am.

Q. And how long have you held that position?

A. Since June of 1947.

Q. In response to a subpoena that has been served upon you have you brought with you the file of one Laura J. Foote? A. I have.

Q. And is that file from the official files of the Fresno County Public Welfare Department?

A. It is.

Q. Was it kept in the regular course of [1191] business?

A. Yes, it was kept in a locked file room.

Q. As the director, are you the custodian of those files? A. Yes, sir.

Q. May I see the file?

A. (Handing counsel.)

Mr. Drewes: Do you wish to examine them?
(To counsel.)

Mr. Drewes: The Government will offer the files in evidence at this time, your Honor.

Mr. Hagerty: At this time, your Honor please, for the purpose of the record we will enter our objections to the admission of this file into evidence on the grounds that it is an attempt to collaterally

(Testimony of Donald A. Jensen.)

impeach the defendant on immaterial matters; it is hearsay; it involves statements of——

The Court: Counsel, I would suggest, without interrupting your objection, counsel, I would suggest that you offer such relevant or assertedly relevant documents as may be applicable or have a bearing on the controversy.

Mr. Drewes: I have given some thought to that problem. This is what I propose to do. I have before me photostatic copies of the documents in that file which the Government believes to be pertinent.

The Court: Why not offer the file for identification merely? Then if you have photostatic copies of certain abstracts from the files, then offer your photostats independently [1192] with the stipulation that they are true and correct copies of the items in the file, and as I indicated to you earlier, I will admit those subject to your objections. But the matter of offering the whole file should be done merely for identification.

The Clerk: U. S. Exhibit number 55 for identification only.

(Thereupon the file in re Laura Jane Foote, Department of Public Welfare, Fresno County, marked for identification U. S. Exhibit number 55.)

Mr. Drewes: Mr. Jensen, I show you a number of photostatic copies of documents and ask you if you have examined them?

A. I have examined them.

(Testimony of Donald A. Jensen.)

Q. And are those true copies of the documents which are in the file which you have just identified?

A. They are.

Mr. Drewes: May it be stipulated, counsel, that these documents, the photostats just identified, may be substituted for the file which has been marked for identification?

Mr. Hagerty: We would so stipulate, subject to our objection to their general admission into evidence, your Honor.

The Court: Now you state your objection. [1193]

Mr. Hagerty: We will object to their admission into evidence on the grounds they are hearsay, it is an attempt to impeach the defendant's testimony on collateral issues; furthermore that the whole scope covered by the documents in question at the dates the period covered within this indictment which is, namely, 1945 and '46, and the base year of 1944, and is not within the issues framed by the indictment.

The Court: And the objection is overruled.

The Clerk: U. S. Exhibit number 55 in evidence.

(Thereupon photostatic copies of extracts from the file in re Laura Jane Foote, Department of Public Welfare, Fresno County, received in evidence and marked U. S. Exhibit 55.)

(Testimony of Donald A. Jensen.)

Mr. Drewes: May I return the official file to Mr. Jensen? May that be withdrawn by consent of counsel?

Mr. Lewis: Yes.

Mr. Hagerty: Yes.

The Court: The official file may be withdrawn.

Mr. Drewes: And I will hand it back to Mr. Jensen.

The Court: Unless counsel for the defense desire for some reason to see it.

Mr. Hagerty: Well, during the cross-examination maybe we could investigate this file a little further.

The Court: You may go over it. [1194]

Mr. Drewes: Many of these documents are of great length and are detailed. For the purpose of speeding the presentation, your Honor, and with the Court's permission and consent of counsel, I propose to read therefore those parts which the Government believes to be pertinent, and observing the rights to read any parts which the defense wishes to put in the record. May that be done?

The Court: Yes.

Mr. Drewes: I will describe each document, ladies and gentlemen, and then simply read from it those parts as I have indicated which I think are pertinent to the issues here. As I stated before, some of them are very extensive and very detailed.

The first document is entitled, "Certificate of verification of eligibility which must accompany application for old age security," and it is dated the

(Testimony of Donald A. Jensen.)

15th day of May, 1959. There appears much, a considerable amount of data with respect to Laura J. Foote.

The date is—counsel advised me I stated the wrong date. The date is May 15, 1939.

There is a good deal of personal data in this document referring to Laura Jane Foote. One item is "Number 7," as follows:

"Has personal property value, \$152.09, including \$152.09 cash in account with daughter." [1195]

And that is signed by Edith V. Forest, County Visitor.

The next document, "Report of Investigation, old age security.

"Applicant's name: Laura Jane Foote.

"Address: 2914 Kearn Street, Fresno."

And again there is a good deal of data here.

"Real property: None.

"Personal property (Cash, mortgages, trust deeds, stocks, bonds, chattels).

"Owned by applicant: None. [1196]

"Insurance: None."

The last item on the first page is entitled, "Responsible relatives: (Spouse and adult children)," and there is noted there six children, and the name of each is given. The last is Betty B. Olender, address: Oakland; relationship: Daughter; "Form AG. 14 filed; yes. Household income: \$150; Number of dependents: Four.

"Applicant's present income from relatives: Housing from daughter, \$7.00."

(Testimony of Donald A. Jensen.)

It is signed Edith V. Forest and it is dated May 15th, 1939.

The next document is entitled, "Renewal Application, Old Age Security, year beginning June, 1940.

"County, Fresno.

"Full name of Applicant: Laura Foote.

"Section V. Changes: Have any changes occurred in the following for you or your spouse since last report:

"Property Holdings: No.

"Property Valuation: No.

"Property Encumbrances: No.

"Savings or cash on hand: No.

"Personal Property: No.

"Stocks, bonds, other securities: No.

"Earnings: No. [1197]

"Insurance: No."

That is signed Laura Jane Foote, and the date is August 7th, 1940.

On the back is the notation in longhand:

"Conditions remain the same. Recommend that aid continue."

Signed Dorothy Blakely, County Agent.

The Court: What is the date?

Mr. Drewes: That is the same date, August 7, 1940. It is the reverse form which I just—from which I just read.

The next report is captioned, "Alameda County Charities Commission, Property Report.

(Testimony of Donald A. Jensen.)

“Date: January 17, 1940.

“To: L. Burrill.

“Case No. 36458. Name: Foote, Laura Jane.

“Address, 351 Fairmount Avenue, Oakland.

“The property at above address is assessed to Emma L. Busby. We are unable to locate any property in the following names and no transfers appear on record since July 1, 1937:

“Laura Jane Foote.

“The above information is taken from the County records as of the following dates:

“Tax Collector’s records as of March 1, 1938.

“Assessor’s records as of date of transfers in Plat Books.” [1198]

That is dated January 17, 1940, and the signature I cannot read.

Q. Can you locate that on your records, your original files? A. Pardon me. What date?

Q. Alameda County Charities Commission, January 17th, 1940. A. I have the original here.

Q. And by whom is that signed, Mr. Johnson?

A. It looks like P. F. Holtzknecht.

Q. Thank you.

The next document is entitled “Recipient’s Affirmation of Eligibility for Old Age Security.”

It reads in part as follows:

“I, Foote, Laura Jane, residing at 2914 Kern, Fresno, herewith affirm my belief that I am eligible for old age security, to wit:

“I do not own real property with an assessed value in excess of three thousand dollars.

(Testimony of Donald A. Jensen.)

“I do not have personal property in excess of five hundred dollars.

“I have acquired personal property consisting of none since my last application for old age security.

“I have disposed of personal property consisting of no change since my last application for old age security. [1199]

“Earnings: None.

“Rentals or proceeds of sale of property: None.

“Annuities or insurance: None.

“Stock dividends: None.

“Interest: Interest on deposit approximately \$150 only.

“I have received during the past year other than old age security income from following sources: None.” That is signed Laura Jane Foote.

“Subscribed and sworn to before me this 16th day of June, 1941, Alice M. Hall, Deputy County Clerk.”

Now on the reverse of that form is “County Report of eligibility investigation:

“Real property: Verified information and source thereof. Property search on file. No property owned.

“2. Personal property: Verified information and source thereof: Bank of America, Oakland, Savings Account 46457—\$152.09 with Betty B. Olander.”

Dated June 30, 1941, signed Alice M. Hall, County Investigator.

(Testimony of Donald A. Jensen.)

The next document is in the form of a letter in reply. It is a prepared form on the same document. It is entitled "Fresno County, Department of Public Welfare, Fresno, California, June 17, 1941.

"Mrs. Laura Jane Foote.

"Dear Madam: [1200]

"All income and resources are to be taken into consideration in computing grants for blind aid and old age security as of July 1, 1941. It is therefore necessary that we have certain information at once so that we may complete our records. Please answer the following questions carefully and completely, sign and return to this office immediately:

"Alice M. Hall, social worker."

And then follows the part for the reply:

"What are your average monthly earnings: None.

"Do you receive cash or free room and board: You are taking \$7.00 per month out of my pension for room rent.

"(7) Do you have savings, postal savings or stocks from which you expect an interest or dividend payment in July? No."

And that is signed Laura Jane Foote and it is stamped as having been received on June 22, 1941. As I stated before, the date of the original letter was June 17, 1941.

The next document is entitled, "Recipient's Affirmation of Eligibility for Old Age Security.

"I, Laura Jane Foote, residing at 2914 Kern

(Testimony of Donald A. Jensen.)

Street, City Fresno, County of Fresno, California, herewith affirm my belief that I am eligible for old age [1201] security, to wit:

“I do not have personal property in excess of \$500.

“I have acquired personal property consisting of none since my last application for old age security.

“I have disposed of personal property consisting of \$150 savings since my last application for old age security.”

And then there are similar questions:

“Earnings: None. Rentals or proceeds of sale of property: None.

“Annuities or insurance: None. Stock dividends: None. Interest: None.”

That is signed Laura Jane Foote, and “Subscribed and sworn to before me this 17th day of June, 1942, Faye Clark, Deputy County Clerk.”

And again on the reverse side of this form, as in the earlier form that I read to you, is the “County Report of Eligibility Investigation.

“1. Real property: Verified information and source thereof. According to this statement she has no real property. Property search shows no recordings to 5/27/1942, no assessments to 5/29/1942.

“2. Personal property: Verified information and [1202] source thereof. Is claimed no personal property except her clothing and personal effects.”

And that is signed Faye Clark and is dated the 29th of June, 1942.

(Testimony of Donald A. Jensen.)

The file contains a number of forms which are entitled "Authorization by Application for Financial Investigation." I will read the first to you and that, of course, will suffice to describe them all.

"To: Any bank, trust company, postal savings department, Building and Loan Association, trust officer, insurance company or other financial institution.

"The undersigned who have applied for, or receiving, aid from the Fresno County Department of Public Welfare, hereby authorize you to furnish said Fresno County Department of Public Welfare any information in your possession with reference to any bank accounts, postal savings, policies, deposits or money in your institution now or hereafter to my credit.

"Our case No. 3630."

It is signed Laura Jane Foote. Address: 2914 Kern Street, Fresno, California.

And then there is a section, the last half of this form, entitled "Returns: Bank of America, Oakland, savings account No. 46457, Mrs. L. J. Foote (2916 Kern Street, [1203] Fresno) joint with 'Betty B. Olender or M. H. Olender.' Present balance, \$152.09."

That is dated May 5, 1939.

Now the next similar form, also signed by Mrs. Foote, does not itself bear a date but the return section is as follows:

"Security First National, Fresno, 5/10/39. No funds.

(Testimony of Donald A. Jensen.)

“Bank of America—Fulton 5/23/39, no funds.”

Mr. Jensen, “Fulton” is that a branch in Fresno, the Bank of America?

A. That is one of the branches of the Bank of America.

Incidentally, your Honor, I might explain these forms. At the time we sent out—we got the applicant’s signed statement releasing such information and then this form was cleared through all the major banks in Fresno, just one right after the other, to see if there was any funds on deposit which had not been reported. That is why there is a series of notations on the same form.

Q. Then the next is a similar form signed by Laura Jane Foote. The return is as follows:

“5/16/39, Central Bank. No account. Bank of America, no account. Central Bank, no account. Farmers & Merchants, no account. Anglo-California, no account. American Trust Company, no account.” [1204]

That is dated May 18, 1939.

The next form is similarly signed by Mrs. Foote. The return is as follows:

“Bank of America, September 27, 1940. No funds. Bank of America-Fulton, September 30, 1940, no funds. Security First National, September 30, 1940, no funds.”

The next form is also signed by Laura Jane Foote.

“Returns: Bank of America, Fulton, August 13,

(Testimony of Donald A. Jensen.)

1941, no funds. Security First National, August 22, 1941, no funds. Bank of America, main, August 28, 1941, no funds.”

The next form is a similar form and also signed by Mrs. Foote:

“Returns: Bank of America, August 4, 1942, no funds. Security First National Bank, August 4, 1942, no funds. Bank of America, Fulton, August 15, 1942, no funds.”

The next form has obviously the same purpose but it is somewhat different in form. This is addressed to the Bank of America, Branch No. 46457, Oakland, California, and it is dated the 25th of July, 1942.

“Gentlemen:

“We are enclosing herewith authorization for examination and report on any accounts the following may have, or may have had with you. [1205]

“Foote, Laura, Jane.”

And then the reply on the same form:

“We have reviewed our records but they do not indicate that the above party has any accounts at this office. Bank of America, N.T. & S.A. Oakland Main Office, J. P. Fiorani, Assistant Cashier.”

The file also includes the following document:

Statement of responsible relative of applicant under the Old Age Security Act of 1935.

“In order that the request of the below-named applicant may be considered, it is necessary that a statement of the financial condition of legally

(Testimony of Donald A. Jensen.)

responsible relatives, including children and spouse of the applicant, be furnished the State by the County. The preparation of this form by responsible relatives will greatly facilitate completion of the investigation which must be carried out through credit associations and others if the relative does not choose to prepare a statement. This form may be returned in care of the applicant or mailed directly to Fresno County, Department of Public Welfare, 2107 Inyo Street, Fresno, California.

Statement of responsible relative.

“I, Mrs. Betty Olender, 351 Fairmount, Oakland, California, [1206] of Oakland, County of Alameda, State of California, the daughter of Mrs. Laura Foote, an applicant for aged aid, do make the following answers to the questions below relative to my ability to aid such applicant.”

Then there are some immaterial questions which have been answered and the following heading:

“Assets: Do you or your spouse own your own home? No. What is the value of other real estate in which you have an interest?”

That is blank.

“Have you any cash on hand? No.

“Have you deposits in the bank: No.

“Have you deposits with building and loan associations: No.

“Have you postal savings: No.

“Do you keep funds in the safe deposit box? No.

(Testimony of Donald A. Jensen.)

“Do you own negotiable securities? No.

“Do you own other stocks, bonds, mortgages or securities? No.

“Do you own personal property?”

Then the amount is shown \$100.

“Have you a part interest in property?”

That is blank. Or there is a little dash in it.

“Do you have an automobile? Yes. Make and model: 1933 [1207] Buick. Value: \$100.”

Then there is a section of “Obligations.” None are shown.

“Monthly income: What is your salary? Zero.

“What income do you receive from building and loan associations, stocks and bonds, rentals, other income:”

And in each case is zero, zero, zero, zero.

“Does your property produce farm or garden produce for household use? Zero. What are your spouse’s earnings? \$150.”

And then there is a section for monthly expenses, and the following:

“County of Alameda, State of California, SS. Betty B. Olender, being first duly sworn, states upon oath that the answers to the foregoing are her own statements; that they are of her own knowledge true in every particular; that they are the whole truth and that she has not practiced evasion nor withheld information as to her ability to aid her parent or spouse.”

And that is signed Betty B. Olender.

(Testimony of Donald A. Jensen.)

“Subscribed and sworn to this 23rd day of May, 1939, before me, a Notary Public of the County and State above written, Joseph Croter, Notary Public in and for the County of Alameda, State of California.” [1208]

Will you turn to that particular affidavit, Mr. Jensen?

A. Can I have the date on that again, please?

Q. Yes. I will see if there is a date. May 26th, 1939. A. I have that.

Q. You will note, Mr. Jensen, that two lines are drawn through the name “Betty B. Olender,” apparently with pen, and the initials J.C.N.P. appear just above the signature of Betty B. Olender. Do you see that? A. Yes sir.

Q. Do you know why those lines are drawn through the name? A. No, I do not.

Q. Will you state, Mr. Jensen, according to your records, when Laura Jane Foote first received old age assistance?

A. She first received old age assistance in Fresno County in June of 1938. But that was on a transfer from Alameda County. The law in California provides that as an old age pensioner moves from one county to another the county where they originally reside will pay aid for a full year until they gain residence in the second county. I do not know the exact date she started to receive aid in Alameda County, but there is an application—her original application was signed in October of 1936.

(Testimony of Donald A. Jensen.)

Q. Is that in your files?

A. It is. A copy of that is in my files. Alameda County, when they transferred the case to Fresno County, sent a copy [1209] of the original application.

Q. Mr. Jensen, does your file reflect when Mrs. Foote ceased receiving old age assistance?

A. Yes. The file—and I will quote here—old age security was discontinued as relatives assumed all responsibility as of February 28th, 1943.

Mr. Drewes: I have no further questions.

Cross-Examination

By Mr. Hagerty:

Q. Mr. Jensen, do you know the defendant, Mr. Olender, who sits here?

A. I met him in the witness room last Thursday for the first time.

Q. But you never heard of him or had seen him before that time, is that true?

A. No, sir.

Q. So far as you know he has nothing to do whatever with those documents that you have before you and to which you have testified, is that true?

A. Your Honor, that is a difficult question for me to answer. On the face of these documents it would appear that Mr. Olender's wife certainly had her signature on some of them and that that would be—If your question would be construed as having—also excluding her and applying directly

(Testimony of Donald A. Jensen.)

to Mr. Olender, I would certainly answer in the affirmative, that he is not— [1210]

Q. He has directly nothing to do with those records, is that right?

A. That is right. If his wife is excluded in that question.

Mr. Hagerty: No further questions.

Mr. Drewes: I have no further questions.

The Court: The witness is excused.

(Witness excused.)

The Court: Have you completed the file? Is it stipulated that the file may be returned?

Mr. Lewis: Yes.

Mr. Hagerty: Yes.

Mr. Drewes: So stipulated.

The Court: Ladies and gentlemen, there are several matters I would like to discuss with counsel, and we might as well take the afternoon adjournment, resuming at ten o'clock tomorrow morning, with the same admonition to you.

(Thereupon the Jury was excused.)

(Discussion outside the presence of the Jury relative to presentation remaining.)

(Therefore an adjournment was taken until ten o'clock a.m. Tuesday, October 7th, [1211] 1952.)

October 7, 1952, 10:00 A.M.

The Court: The Jurors are present.

Mr. Hagerty: So stipulated.

Mr. Drewes: So stipulated.

MORRIS LERMAN

called by the defendant, sworn.

The Clerk: Please state your name, your address and your occupation or your calling to the Court and to the Jury?

A. My name is Morris Lerman. I reside at 653 Polama Avenue, Albany. I am a realtor investor for myself.

Direct Examination

By Mr. Hagerty:

Q. Mr. Lerman, would you tell His Honor and the ladies and gentlemen of the Jury what your occupation was, say in the year 1945?

A. In 1945 I was engaged in the so-called military supply business, such as uniforms, hats, caps, shoes and so forth, the need for military personnel.

Q. At this time I will show you Government's Exhibits Nos. 43 and 44, which appear to be checks, and ask you if you can identify them?

A. Those are my checks.

Q. There are two checks in the amount of \$2,500 each, is that [1212] true?

A. That's correct.

Q. Exhibit 44, drawn on May 14th, 1945, pay-

(Testimony of Morris Lerman.)

able to the American Trust Company, is that correct? A. That's correct.

Q. And Exhibit No. 43 is May 15—dated May 15, 1945, drawn payable to the same bank, the American Trust Company, in the same amount.

Could you tell the ladies and gentlemen of the Jury what these checks—what sort of a transaction they were drawn to cover?

A. Those checks were made payable to the American Trust Company for the purpose to secure two cashier's checks in payment for some sailor suits. The checks were originally made out to Mr. Lew Leavy, which was operating at that time a wholesale supply business of our needs.

Q. You had arranged for the purchase of suits from Mr. Lew Leavy, sailor suits?

A. That is true.

Q. And these checks were drawn to the American Trust Company in payment thereof?

A. That's correct.

Q. Did you receive any further checks from the American Trust Company to complete the transaction?

A. No, I received two separate checks of \$2,500 each. [1213]

Q. In other words, these two checks—with these two checks you bought cashier's checks?

A. That's correct.

Q. With the cashier's checks you paid Mr. Leavy for the suits?

A. That is correct.

(Testimony of Morris Lerman.)

Q. Did you know where the suits had been obtained originally?

A. Say it again, please?

Q. Let me withdraw it. I will restate it to you. Did you know where the suits had come from originally? A. No.

Q. That you bought from Mr. Leavy?

A. No.

Q. I show you Government's Exhibits 38 and 39, which appear to be invoices covering certain transactions. Can you identify them?

A. I can.

Q. What do they represent?

A. Well, they apparently represent a hundred suits each at \$25 each, which I believe the checks that I have drawn from the American Trust Company cover this invoice.

Q. In other words, it would be a fair statement to say then, Mr. Lerman, that those invoices cover the suits that you purchased with these checks? A. That is correct. [1214]

Q. Now, Mr. Lerman, you know the defendant, Mr. Olender, who is on trial here? A. I do.

Q. Do you know where his store was located at that time in Oakland?

A. Just a block away from my store, across the street.

Q. In other words, you were nearby competitors, is that true? A. That's correct.

Q. At that time did you know those suits had originated in his store? A. No, I did not.

(Testimony of Morris Lerman.)

Q. Now those suits, can you tell the ladies and gentlemen of the Jury what sizes they were and whether they were correctly labelled as to size?

A. Well, no, unfortunately they were not.

Q. You mean they were not correctly labelled as to size?

A. They were not correctly labelled.

Q. What sizes were they, large or small?

A. They were mostly large.

Mr. Shelton: If the Court please, might the witness be shown the two invoices in evidence in connection with those sales in connection with his testimony as to size?

The Court: Yes.

Mr. Hagerty: If your Honor please, this is direct [1215] examination. I think counsel understands trial procedure. He will have the opportunity of cross-examination.

The Court: All right.

Mr. Hagerty: To return, Mr. Lerman, you found that the suits were not correctly labelled, is that right?

A. Well, not in this particular case alone, but in prior cases it was a haphazard—the cutting of those suits were absolutely haphazard. In numerous other case I received——

Mr. Drewes: Objection, your Honor. May the testimony be confined to the transaction in question? The other cases are immaterial and irrelevant.

The Court: Yes.

Mr. Hagerty: Yes, we have to concentrate on

(Testimony of Morris Lerman.)

this particular transaction, Mr. Lerman.

Q. But is it fair to state, then, in this transaction you found that the suits were large and that they were labelled smaller sizes than they actually were?

Mr. Shelton: Objected to, your Honor. That is leading and suggestive to get the answer which counsel wants elicited, and I will object to it on that ground.

Mr. Hagerty: I will withdraw it and I will ask Mr. Lerman, will you please tell us—

A. Well, the sizes, they did not represent what the invoice called for. They were, the majority of those sizes, I would say, 80 to—75 to 85 per cent were erroneously marked. [1216] They were mostly large sizes, such as 40's, 42's, and in some cases were 38's, and very few 36's and no 34's, if I remember right.

Q. Mr. Lerman, the average man—well, let me withdraw that and say this. In your experience at that time in dealing with sailors in their requests for suits, did you find that the average sailor was a big man or a small man?

A. The majority predominate between 36 and 38.

Q. And then as a result the general demand for suits would be in the smaller sizes?

Mr. Shelton: Objected to, your Honor. The witness has just testified that the majority were in the middle sizes, and counsel is trying to lead for the answer he wants.

(Testimony of Morris Lerman.)

Mr. Hagerty: That is the answer I want.

Q. Is that considered a small size, 36 and 38?

A. I would say that is the average size. Smaller size than——

Q. It is lots smaller size than 42, isn't it?

A. Yes.

Q. Now, how could you handle these suits that were over-sized, Mr. Lerman, when the general demand was for smaller-sized suits?

A. We were forced to alter those suits.

Q. Did you operate a tailor shop in conjunction with your store? [1217] A. Yes, we did.

Q. You had a full-time tailor employed by you?

A. We had three people in our shop.

Q. So then you had immediately available the means of making the necessary alterations?

A. We did.

Q. To your knowledge, Mr. Olender, the defendant here, did he have a tailor shop in conjunction with his business?

A. I don't believe so. I never saw a tailor shop in his store.

Mr. Hagerty: You may cross-examine.

Cross-Examination

By Mr. Drewes:

Q. Mr. Lerman, you testified that the majority of sailors in your experience were size 36 and size 38. There were many, many sailors who were larger than that, were there not?

(Testimony of Morris Lerman.)

A. Yes. But as a rule the kids who used to be in the Navy, they were small boys.

Q. But there were many who were not?

A. That's true. But I say the majority is 36 and 38.

Q. With respect to the U. S. Exhibits Nos. 38 and 39, which are the invoices that you have identified, I call your attention to No. 38, which shows ten size 35's. Did you get those suits?

A. Well, I couldn't remember that far back if I did or [1218] didn't. But I remember this, that if we did get them, they were not to the size. I mean, they were not—35, maybe 38.

Q. The other invoice, Exhibit No. 39, there are fifteen size 35's. Didn't you get any size 35's?

A. Possibly.

Q. Both of those invoices are dated in 1945, in May, and that was the date of the transaction?

A. That's correct.

Q. And that was some approximate seven years ago?

A. That's right.

Q. And can you say now that you got no 35's, no 36's, no 37's?

A. If I got—received any, it was a very small proportion of what they should be, if I received any. But, however, I can't recollect that far back.

Q. You were very glad to get those suits, were you not?

A. Very much so.

Q. As a matter of fact, not long ago in my office you said they were just like gold to you?

(Testimony of Morris Lerman.)

A. That's right.

Q. You remember that. You have known Mr. Olender for quite some time, have you not, Mr. Lerman?

A. I have.

Q. About how long? [1219]

A. Oh, I imagine about—I have known him off and on for at least 15 years or maybe longer than that, but more closer since I went in that line of business.

Q. And speaking of "that line of business," during the years in question?

A. During the years 1942 to 1947.

Q. Between the years 1942 and 1947 did you sometimes buy merchandise from Mr. Olender when you were short and did he sometimes buy merchandise from you?

A. Well, there was a reciprocity between the dealers to help one another.

Q. And you sometimes helped Mr. Olender by giving him merchandise when he was short and—

A. Occasionally.

Q. —and he sometimes helped you by giving you merchandise when you were short?

A. Occasionally.

Q. You would say, would you not, that you were friendly competitors?

A. We were.

Q. And is it not true, Mr. Lerman, that you and Mr. Olender belonged to clubs, the same clubs, in Oakland?

A. That is true.

Q. What clubs do you belong to?

(Testimony of Morris Lerman.)

A. We belong to the Lions Club, belong to the Shriners' Club, [1220] the Athens Athletic Club.

Q. Do you see Mr. Olender almost every week?

A. Practically every week at luncheon on Wednesday, particularly, the Lions Club.

Mr. Drewes: Thank you. That is all.

Mr. Hagerty: No further questions.

(Witness excused.)

Mr. Shelton: Mr. Carroll of the Bank of America, please.

Mr. Hagerty: If your Honor please, just to keep the record straight and so forth, Mr. Lerman was our last witness, and the defense rests at this time.

CLIFFORD F. CARROLL

resumed the stand on behalf of the Government in rebuttal, and having been previously duly sworn, testified further as follows:

The Clerk: You have heretofore been sworn in this case?

A. I have.

Q. You are still under oath.

A. Yes, sir.

Q. Please restate your name?

A. Clifford F. Carroll. [1221]

Direct Examination

By Mr. Shelton:

Q. Mr. Carroll, you have previously testified in this case and stated your connection with the

(Testimony of Clifford F. Carroll.)

Bank of America in Oakland? A. I have.

Q. And you have been asked this morning to produce designated records of your bank?

A. I have.

Q. Will you state whether or not all these records which you have produced today were kept in the regular and usual course of the bank's business?

A. They were except the ledger cards, which I have made copies of.

Q. And those are true copies of original records of the bank? A. They are.

Q. Will you state whether or not you examined them to see that they were correct copies?

A. I did.

Q. Mr. Carroll, have you produced this morning two records of loans made by the Army & Navy Store from your bank, one in the year 1945, and one in the year 1946? A. I have.

Q. Referring to the one in 1945, Mr. Carroll, will you state the date of that application for a loan by the Army & [1222] Navy Store?

A. Mr. Counsellor, these are applications by Milton Olander.

Q. All right. Applications then by Milton Olander. What is the date of the 1945 application, Mr. Carroll? A. July the 11th, 1945.

Q. July 11th, 1945. And does the application show the term of the loan?

A. The maturity date, you mean?

(Testimony of Clifford F. Carroll.)

Q. The length of time the loan was——

A. The maturity—it was supposed to be paid the 10th day of—wait a minute—October 9, 1945.

Q. That would be a three-month loan, then, would it not, approximately?

A. Approximately.

Q. And does that record show the amount of that loan? A. It does.

Q. How much? A. \$30,000.

Q. Now turning, Mr. Carroll, to the—strike that. Does the application show the purpose for which that loan was negotiated?

A. According to this application, this here record, Mr. Olender was to use this to—use the funds to buy naval uniforms and to liquidate all or part of this loan at [1223] maturity.

Q. Does that indicate then that Mr. Olender intended at the time he applied for the loan——

Mr. Hagerty: I will object to this form of questioning, your Honor. It is a summing up in a summarization of the witness' testimony again——

Mr. Shelton: I will rephrase it.

Mr. Hagerty: The thing that Mr. Shelton found objection to.

Mr. Shelton: I will rephrase it, counsel.

Q. Will you state, Mr. Carroll, what that loan application indicates as to whether Mr. Olender intended to pay off the whole loan at maturity, whether or not he intended to——

(Testimony of Clifford F. Carroll.)

A. It is to liquidate all or part of this loan at maturity.

Q. Thank you, Mr. Carroll. Now does the application also indicate what security Mr. Olender put up for that loan? A. It does.

Q. What security did he put up?

A. U. S. Treasury bond.

Q. In what amount, please?

A. \$10,000 U. S. Treasury bonds of 1951-53. \$13,000 U. S. Treasury bonds of 1952-54. \$8,000 Treasury bonds of 1952, and \$1,000 U. S. Treasury bonds 1956.

Q. Will you state whether or not that total would amount to \$32,000? [1224]

A. It would.

Q. Turning now, Mr. Carroll, to the 1946 loan, what date did that become effective?

A. On August 22, 1946.

Q. And does that indicate the length of the loan, the length of time for which the money was borrowed?

A. Maturity date is to be paid by 11/30/46.

Q. That would be a little more than three months? A. It is 11/20/46.

Q. That would be a three-month loan, then, would it not? A. Approximately.

Q. And does the application indicate the amount of the loan? A. It does.

Q. How much, please? A. \$10,000.

Q. Does the application indicate the purpose of the loan?

(Testimony of Clifford F. Carroll.)

A. To cover part of the purchase price of a new home which he recently bought.

Q. Does the application indicate whether or not collateral was put up for the loan?

A. It does.

Q. What does it indicate?

A. \$10,000 U. S. bonds, Treasury bonds.

Q. May I have those two sheets?

A. (Witness producing.) [1225]

Mr. Shelton: The Government will offer the 1945 loan application as its Exhibit next in order on the 1946 as the one following that.

The Court: They may be marked.

The Clerk: U. S. Exhibit No. 57 in evidence.

(Thereupon the loan application, 1945, 1946, was received in evidence and marked U. S. Exhibit No. 57.)

Q. (By Mr. Shelton): Mr. Carroll, have you produced here a deposit slip in the amount of \$15,000 dated June 1st, 1945? A. I have.

Q. And may I see it, please?

A. (Witness producing.)

Mr. Shelton: I show this to counsel (handing to counsel).

Counsel, is there any objection to our offering a copy in evidence and letting Mr. Carroll take the original?

Mr. Hagerty: No objection.

Mr. Shelton: The Government will offer the copy of the deposit slip as its exhibit next in order.

(Testimony of Clifford F. Carroll.)

The Court: It may be marked.

The Clerk: U. S. Exhibit No. 58.

(Thereupon deposit slip, \$15,000, June 1, 1945, was received in evidence and marked U. S. Exhibit No. 58.)

Q. (By Mr. Shelton): Mr. Carroll, will you state what account that money was deposited in as shown by the deposit [1226] slip?

A. Milton H. Olender.

Q. Will you state whether or not that was the commercial account? A. It was.

Q. Will you state in what form the \$15,000 was deposited as shown by the deposit slip?

A. It shows \$15,000 cash, currency.

Q. Mr. Olender, have you also produced here a ledger card and a—

Mr. Hagerty: Mr. Carroll.

Mr. Shelton: What did I say?

Mr. Hagerty: Olender.

Q. (By Mr. Shelton): Mr. Carroll, have you also produced here a ledger card and a signature card of the Army & Navy Store commercial bank account, 1026 Broadway? A. I have.

Q. May I have the signature card or cards, Mr. Carroll?

A. There is the original signature card of the Army & Navy Store.

Q. May I have the ledger sheet at the same time, if you can locate that?

A. Do you want the dates?

(Testimony of Clifford F. Carroll.)

Q. Yes. Will you give the dates covered by that ledger sheet? [1227]

A. These ledger sheets cover the commercial account for the Army & Navy Store at the Oakland office of the Bank of America from December 31st, 1943, to and including December 31st, 1946.

Mr. Shelton: The Government will offer these two signature cards of the Army & Navy Store account as its exhibit next in order.

Mr. Hagerty: No objection, your Honor.

The Court: They may be marked.

(The signature cards referred to were thereupon received in evidence and marked U. S. Exhibit No. 59.)

Mr. Shelton: The Government will offer as its exhibit No. 60 true copies of the ledger cards of the same account for the period December 31st, 1943, to December 31st, 1946, inclusive.

The Court: They may be marked.

(The ledger cards referred to were thereupon received in evidence and marked U. S. Exhibit No. 60.)

Q. (By Mr. Shelton): Mr. Carroll, have you also produced a signature card and a ledger account for savings account No. 35225 in the name of Mrs. M. H. Olender? A. I have.

Q. May I have those, please? Will you please state what period is covered by the ledger card?

(Testimony of Clifford F. Carroll.)

A. This statement, ledger card, covers the savings account [1228] No. 35225 in the name of Betty Olender from December 20th, 1945, to September 7th, 1951. As a matter of fact, it has no entries at that last date except the interest credits.

Mr. Shelton: I will state to the Court and counsel that the ledger card is being offered only as to the period through 1946. We agree that the later period has no relevancy, your Honor.

The signature card of Mrs. M. H. Olender on this account is offered as Government Exhibit 61.

The Court: It may be marked.

(The signature card referred to was thereupon received in evidence and marked U. S. Exhibit No. 61.)

Mr. Shelton: The ledger card through the period December 31st, 1946, is offered as Government's Exhibit No. 62.

The Court: It may be marked.

(The ledger card referred to was thereupon received in evidence and marked U. S. Exhibit No. 62.)

Q. (By Mr. Shelton): Mr. Carroll, have you also produced here pursuant to subpoena some cashier's checks of your bank? A. I have.

Mr. Shelton: Mr. Hagerty has just asked me about putting in the originals here and my arrangement with Mr. Carroll was that the Government would either have photostats [1229] made by per-

(Testimony of Clifford F. Carroll.)

mission of the Court or else would work out an arrangement to return these at the end of the trial after giving Mr. Carroll a receipt.

Mr. Hagerty: It was a matter of no particular interest to us, but we thought for the convenience of the bank——

The Witness: That is an active savings account. I would like to have that back. I can produce a photostat. It is an active savings account.

Q. (By Mr. Shelton): I thought you said you could take a letter, didn't you? Didn't you say I could write you a letter?

A. Regarding the checks.

Q. I beg your pardon. I understood that applied to this also. A. No.

Q. Do you have a photostatic copy of this ledger sheet?

A. Not right now I do not. I can have it tomorrow.

Mr. Hagerty: We will stipulate that it can be withdrawn and photostated. I think that is the same as one of our exhibits, isn't it?

Mr. Shelton: I am speaking of the Olender savings account.

Mr. Hagerty: I think we have her bank book in evidence.

Mr. Shelton: A different record showing the same thing.

Mr. Hagerty: The same thing. [1230]

Q. (By Mr. Shelton): I was asking, Mr. Car-

(Testimony of Clifford F. Carroll.)

roll, if you had produced some cashier's checks and had produced the applications therefor so far as available? A. I have.

Q. Have you produced cashier's check No. 25114579 for \$1,000 purchased on May 29th, 1946?

A. What is that amount again?

Q. \$3,000?

A. I did not hear that date again, counsellor.

Q. It is May 29th, 1946, Mr. Carroll.

A. I have.

Q. Have you also produced cashier's checks Nos. 25105210 and 5211 in the amounts of \$10,000 and \$15,000, respectively, purchased December 5, 1945?

A. I have the one for \$15,000. Is that what you asked?

Q. And the \$10,000 also of the same date, Mr. Carroll. A. That is December 5th?

Q. Yes, December 5th, 1945. A. I have.

Q. Have you also produced No. 15196778 in the amount of \$3,000, the next one, 79, in the amount of \$3,500, the next one in the amount of \$3,500, and the final one in the amount of \$5,000, all purchased about May 24th, 1945?

A. Counsellor, I will have to stop you. You are going too fast for me. Start in again. [1231]

Q. They were four consecutive ones, Mr. Carroll, dated May 24th, 1945, and the ending serial numbers are 78, 79, 80 and 81.

A. They are both dated May 31st?

(Testimony of Clifford F. Carroll.)

Q. All four dated on or about May 24th according to the subpoena. That may not be quite right.

A. I have 25196780 and 25196781.

Q. You also have 78 and 79, which are the two immediately preceding those by number?

A. How much are they?

Q. The first one is \$3,000 and the second one is \$3,500.

A. I have 6778, 779, \$3,500.

Q. You have a total of seven there that I have asked for in this group?

A. One, two, three, four, five, six and seven.

Q. To what extent, Mr. Carroll, were you able to find applications for these seven cashier's checks that you have handed me?

A. I only have one application for all the checks.

Q. Will you hand that one to me, please?

A. I will have to tear this out.

Q. Will you state, if you know, Mr. Carroll, what happened to the remaining applications?

A. They are destroyed after five years.

Q. In the normal course of the bank's [1232] business?

A. Yes, sir.

Mr. Shelton: The Government will offer as its collective exhibit next in order the seven cashier's checks and the one application produced by the witness.

The Court: So ordered.

(The checks and application referred to were thereupon received in evidence and marked U. S. Exhibit No. 63.)

(Testimony of Clifford F. Carroll.)

Q. (By Mr. Shelton): Mr. Carroll, have you also produced a cashier's check in the amount of \$15,833.46 dated on or about June 5th, 1945?

A. I have.

Q. Will you state whether or not you were able to locate an application for that cashier's check?

A. I was not successful.

Q. May I have the check? A. Yes.

Mr. Lewis: No objection.

Mr. Shelton: This cashier's check is offered as Government's Exhibit 64.

The Court: It may be marked.

(The cashier's check referred to was thereupon received in evidence and marked U. S. Exhibit No. 64.)

Q. (By Mr. Shelton): Mr. Carroll, I will ask you for a series of nine cashier's checks and the applications therefor. Each of the nine checks is in the amount of either \$2,250 or [1233] \$2,350, and they are all dated in January of 1944.

A. I have them.

Q. Will you state whether or not you were able to locate any applications for those nine cashier's checks, Mr. Carroll?

A. Those applications have been destroyed.

Mr. Shelton: The Government will offer these nine cashier's checks in evidence as its exhibit next in order.

The Court: They may be marked.

(Testimony of Clifford F. Carroll.)

(The cashier's checks referred to were thereupon received in evidence and marked U. S. Exhibit No. 65.)

Q. (By Mr. Shelton): Mr. Carroll, will you state whether or not each of these nine cashier's checks is made payable to the same person?

A. They are.

Q. Who is that person?

A. George Goodman.

Mr. Shelton: You may examine.

Cross-Examination

By Mr. Hagerty:

Q. Preliminarily I might ask you, Mr. Carroll, since you have already been qualified as an employee of the Bank of America, you are familiar with their usual bank books and checks, is that true?

A. I am familiar with their general ledger cards, general stationery, books and whatnot. I was in the bank thirty years [1234] last month.

Q. Mr. Carroll, when you were here before you remember we had certain interrogations of you with reference to the safety deposit boxes of the defendant?

A. Yes, sir.

Q. In the interim were you able to ascertain the dimensions of certain of those boxes? I believe you wanted that information, too, counsel.

Mr. Shelton: I did not hear the question.

(Testimony of Clifford F. Carroll.)

Mr. Hagerty: The size of the safety deposit boxes.

Mr. Shelton: In any event, you wanted it. We didn't ask for it.

A. Discussion of the safe deposit box concerned, I presume, a \$4 box?

Q. (By Mr. Hagerty): No. 2912. Would that be a \$4 box? A. Yes.

Q. Could you give us the dimensions of it?

A. The dimensions—they run 19½ inches long, 5 inches wide, and they vary from an inch and a half to two inches in depth.

Q. Box 56—could you tell us the dimensions of it? That is probably a \$12 box. Would that refresh your memory?

A. No, I have never measured that.

Q. Do you have any idea how much currency or, using large denominations of bills, you could place in this small box, [1235] the \$4 box?

A. Approximately 900 pieces of paper.

Q. About 900 pieces of paper. If they happen to be thousand dollar bills——

A. I mean the normal size currency.

Q. 900 individual items?

A. Approximately that. Sometimes a little more, sometimes a little less.

Q. I will show you here a bank book and ask you if you could identify it.

A. This is a savings pass book No. 129, depositor's name is Milton H. Olender, carried at

(Testimony of Clifford F. Carroll.)

the Bank of America, Fresno Branch, Fresno, California.

Q. Could you tell us what is on deposit there?

A. \$3,000.

Q. And the date of it?

A. You would have to have better eyesight than I have to see that. December 22nd, forty something—49 or 41.

Mr. Hagerty: At this time, if your Honor please, I would offer this passbook as the defendant's next exhibit.

Mr. Shelton: No objection, your Honor.

The Court: It may be marked.

(The passbook referred to was thereupon received in evidence and marked Defendant's Exhibit AP.)

Q. (By Mr. Hagerty): I show you a check, Mr. Carroll, and [1236] ask you if you can identify it?

A. That is a check drawn by the Army & Navy Stores, commercial account of the Oakland main office, Bank of America, dated May 24th, 1945, payable to Milton Olender in the amount of \$15,000. It looks to me like it is signed, "M. Olender."

Q. Do the endorsements indicate anything as to whether the check has been cashed or paid by the bank?

A. It indicates to me that it was negotiated through the collection department. It was not deposited. It was not cashed.

(Testimony of Clifford F. Carroll.)

Q. I point out to you, Mr. Carroll, an apparent rubber stamp mark on the face of the check. Would that indicate anything?

A. It would indicate the collection department.

Mr. Shelton: At this time, if your Honor please, I would offer this check as defendant's Exhibit next in order.

Mr. Hagerty: No objection, your Honor.

The Court: It may be marked.

(The check referred to was thereupon received in evidence and marked Defendant's Exhibit A Q.)

Mr. Hagerty: No further questions of this witness.

Redirect Examination

By Mr. Shelton:

Q. Mr. Carroll, showing you this last check Mr. Hagerty introduced in evidence, I will ask you whether [1237] or not the stamp on that check indicates to you that that might have been used to purchase four cashier's checks?

A. It would.

Q. As a matter of fact, Mr. Carroll, there were four cashier's checks which you brought in here at our request purchased on that same day, May 24th, 1945, were there not?

Mr. Hagerty: Is that the date?

Mr. Shelton: Mr. Clerk, may I see those checks? Your Honor, that is later. Will your Honor indulge us a minute?

(Testimony of Clifford F. Carroll.)

Q. Mr. Carroll, I will direct your attention to the endorsements on the back of the check and ask you if you can determine on what date payment was made on that check?

Your Honor, in the interests of time, may I ask the witness whether he can see "June 1st" on the back? A. June 1st, 1949.

Mr. Shelton: Thank you, Mr. Carroll. Is that 1945, Mr. Carroll?

The Witness: Let me look at that again, will you, please? 1945 is correct.

Mr. Shelton: Thank you, Mr. Carroll. If your Honor please, may we have permission to withdraw such of these exhibits as are necessary for photostating and return the originals to Mr. Carroll. We have no further questions.

Mr. Hagerty: We have no questions.

The Court: The witness is excused. [1238]

The Witness: Thank you, your Honor. May I withdraw the savings ledger card and the signature card on the savings account of Betty Olender and I will furnish a photostatic copy tomorrow.

Mr. Hagerty: We have no objection, your Honor, and the same entries are covered in defendant's Exhibit D, which are Betty Olender's bank account.

The Court: Very well. We will take a recess at this time. Remember the admonition, ladies and gentlemen, not to discuss the case.

(Recess.) [1239]

LOUIS H. MOOSER

recalled on behalf of the Government, previously sworn.

The Clerk: Mr. Mooser, you have heretofore been sworn. Will you please restate your name?

A. Louis H. Mooser.

Direct Examination

By Mr. Shelton:

Q. Mr. Mooser, at my request have you made a search of the records of the Office of the Collector of Internal Revenue for the years 1939 to 1945 to determine whether any income tax return was filed in those years by Mrs. Laura Jane Foote of 2914 Kern Street, Fresno?

A. Yes, sir, I have.

Q. What did that search show, Mr. Mooser?

Mr. Hagerty: If your Honor please, I will object to it as being incompetent and irrelevant, immaterial, not within the issues of this case.

The Court: Overruled.

A. I was unable to find any such return for those years.

Mr. Shelton: For any of the seven years in question?

A. That's correct.

Mr. Shelton: You may examine.

Mr. Hagerty: We have no questions.

Mr. Shelton: Thank you, Mr. Mooser.

(Witness excused.) [1240]

SETH L. ROOT

recalled on behalf of the Government, sworn.

The Clerk: Mr. Root, you have heretofore been sworn?

A. Yes.

Q. Please restate your name for the record.

A. Seth L. Root.

Direct Examination

By Mr. Shelton:

Q. Mr. Root, you are an Internal Revenue agent? A. Yes.

Q. Were you in Court at the time that Mr. Olender was asked concerning a conference with you on January 13, 1948? A. Yes.

Mr. Shelton: As the Court and Jury, I believe will recall, Mr. Olender was asked at that time whether he had any conversation with Mr. Root about the Goodman transactions, at the time of that conference.

Mr. Hagerty: If your Honor please, I don't like to criticize counsel, but I don't think the statements are necessary all the time, preliminary statements as to what is going to be outlined. If he wants to make a preliminary showing, we could remove the Jury.

The Court: I suppose it points up the situation for the reception of testimony. In this particular instance it did not do any harm, as I see it. [1241]

Q. (By Mr. Shelton): Mr. Root, I will read

(Testimony of Seth L. Root.)

from page 832 of the transcript in this case. The witness at that time was Mr. Olender, and on examination by Government counsel, the following question and answer occurred:

“Q. I will ask you whether or not it is also a fact that on that occasion in your office you told Revenue Agent Root you were unable to recall the circumstances of the transaction with Mr. Goodman?”

“A. I don't remember that, sir.”

Will you tell the Court and the Jury what transpired with respect to that matter after your conference with Mr. Olender on January 13, 1948?

The Court: Who were all the persons present, Mr. Witness?

A. Mr. Olender and I were the only persons present at this conference—if you want to call it that. I was working on his books at his place of business at that time, and in the course of the conference I asked him if he was able to recall the circumstances of the Goodman transaction which Mr. Blanchard had covered with him before and he said at that time that he was still unable to recall the circumstances of that transaction.

Mr. Shelton: You may examine.

Cross-Examination

By Mr. Lewis:

Q. Mr. Root, I show you United States [1242] Exhibit 45, and directing your attention to “Goods received as follows”—

A. Yes.

(Testimony of Seth L. Root.)

Q. Did you supply that information for Mr. Ringo?

Mr. Drewes: I will object, your Honor, on two grounds; first, that it is improper cross-examination, and, second, that the Government Exhibit No. 45 as introduced in evidence was limited to item 19 alone.

The Court: Mr. Lewis may call him as his own witness on that behalf. I don't have any objection.

Mr. Drewes: Will you, Mr. Lewis, state you are calling the witness as your own witness?

Mr. Lewis: Yes.

The Court: As to that item, he may.

A. Will you restate the question?

Q. (By Mr. Lewis): Did you give the information to Mr. Ringo, the dates of the Goodman goods' arrival?

A. Yes, that was furnished to Mr. Ringo at a date subsequent to this conference.

Q. Will you read the dates?

A. May 25, 1944, \$1,610. June 8th, 1944, \$9,200. June 14, 1944, \$690. Balance—with a question mark—\$9,000.

The Court: Where was that determination made, from way bills or—— [1243]

A. Yes, those were made from——

The Court: Invoices?

A. Invoices.

The Court: Invoices or way bills?

A. From invoices.

(Testimony of Seth L. Root.)

The Court: All right.

Mr. Lewis: Your Honor, at this time I will ask that United States Exhibit 45 become a defendant's exhibit for the purposes of showing when the Goodman goods were received.

Mr. Shelton: Mr. Lewis, could you make it a little clearer what you are offering? Are you offering—

Mr. Lewis: I am offering the portion of the exhibit at the bottom of the page reading as follows:

“Goods received as follows:

“5/25/44, \$1,610.

“6/4/44, \$9,200.

“6/14/44, \$690.

“Balance, \$9,050.

“Total, \$20,550.”

Mr. Shelton: As appearing on the first page of the exhibit?

Mr. Lewis: Yes.

Mr. Drewes: If your Honor please, the exhibit was made by Mr. Ringo, who was the defendant's then accountant. I submit that if the defense is going to offer that exhibit [1244] or any part of it, it should be offered as to its entirety.

Mr. Lewis: Your Honor, I think the information—Mr. Root testified he gave that information to Mr. Ringo.

The Court: I think possibly we are enlarging upon a situation that requires only an explanatory

(Testimony of Seth L. Root.)

note. This witness has explained the date of arrival of certain goods. This witness states that he gave the information to Mr. Ringo as to the dates. Now that explanation, it would seem to make little difference to the Court who offered the exhibit, who sponsored the particular matter. That is an explanatory note in the record.

Mr. Lewis: That's right.

The Court: If you did not have the exhibit, if you had lost the exhibit, there stands on record testimony in the case.

Mr. Lewis. That's right.

The Court: So it is immaterial who offers it. The exhibit is marked U. S. Exhibit No. 45 in evidence. This witness has explained certain phases of it. That seems to be sufficient.

Redirect Examination

By Mr. Shelton:

Q. Mr. Root, I will ask you the source of the information with respect to those transactions which you furnished to Mr. Ringo as questioned by Mr. Lewis?

A. Those were invoices that I received from special agent [1245] Blanchard at a time subsequent to the time that I met with Mr. Olender.

Q. In other words, you received those from Mr. Blanchard after January the 13th, 1948?

A. Yes.

Q. Mr. Root, will you state whether or not the

(Testimony of Seth L. Root.)

goods that were shown as received by those invoices were tied in with the original Goodman purchase of \$20,550, or did you make some assumption in that regard?

A. Well, these merely show George Goodman invoices. Whether it is—that those are the identical goods that were originally purchased, I cannot—I cannot say.

Q. It is my understanding, then, that you do not know then whether these figures that you put on this exhibit represent part of the original goods purchased with the \$20,550?

Mr. Hagerty: If your Honor please, I will object—

The Court: Sustained.

Mr. Shelton: If your Honor please, for this purpose, isn't it cross-examination because he was Mr. Lewis' witness on this point and therefore the Government is entitled to ask leading questions on a matter on which Mr. Lewis made Mr. Root his witness?

Mr. Hagerty: If your Honor please, this witness is undoubtedly an adverse witness to us. He is also the witness of counsel on that particular point. They have discussed [1246] this in advance.

The Court: May I see the exhibit again? Would you rephrase that question, counsel?

Q. (By Mr. Shelton): Mr. Root, then do you know whether or not these transactions evidenced by the invoices were the same transactions evi-

(Testimony of Seth L. Root.)

denced by the \$20,550 of Goodman cashier checks dated January, 1944? A. No.

Mr. Shelton: You may examine.

Recross-Examination

By Mr. Lewis:

Q. You don't know whether they are the same, you don't know whether they are not, do you, Mr. Root? A. I am unable to identify the goods.

Q. I think in your direct examination you testified to a meeting and that Mr. Olender did not explain to you or did not recall facts of the Goodman transaction. Did you read Mr. Olender's affidavit given to the Government on the 13th day of September, 1948?

Mr. Shelton: Just a minute. Your Honor, objected to as not proper redirect. Proper recross, I suppose you would call it. That wasn't taken up by me in questioning Mr. Root on redirect.

The Court: Overruled.

A. Will you state that again?

Q. (By Mr. Lewis): I say, Mr. Olender gave you an affidavit [1247] outlining this transaction in September of 1948, didn't he?

A. Yes, that was at a time subsequent to this original meeting.

Q. And also Mr. Leavy gave you an affidavit at about the same time?

A. Well, those were submitted with the net

(Testimony of Seth L. Root.)

worth statement which Mr. Olender furnished, furnished me.

Mr. Lewis: That is all.

Further Redirect Examination

By Mr. Shelton:

Q. Mr. Root, by September, 1948, your investigation had proceeded to a rather advanced stage, had it not?

Mr. Hagerty: I will object to that. It is calling for the conclusion and opinion; it is leading and suggestive of his own witness. He is on redirect examination of his own witness now.

The Court: Overruled.

A. Why, I had requested the net worth statement from Mr. Olender and it was about that time that Mr. Olender submitted it, and in the meantime the investigation, certain phases of it, were being carried on.

Mr. Shelton: No further questions.

Mr. Lewis: No further questions.

The Court: In clarification of the examination conducted by the Government and the defense counsel, the Court [1248] desires to direct a question to you, Mr. Witness.

Would you read into the record for the benefit of the Court and the Jury commencing at No. 20 the legend and then the dates and the amounts and the corresponding totals so that this will appear as the climax to the examination.

(Testimony of Seth L. Root.)

First, what is the significance of No. 20 in the marginal area?

A. Well, at the time Mr. Ringo advised me that Mr. Olender retained him to prepare this net worth statement, he wanted to know the particular problems that were going to confront him.

The Court: He, Ringo?

A. Yes.

The Court: And then, as I gather it you and Ringo had a discussion?

A. Yes.

Q. And you then indicated to Mr. Ringo the points of controversy, is that correct, or the points of difference?

A. I said that we had a question here of some merchandise which had been purchased from one George Goodman and I wanted him to be aware of that fact in doing his work.

The Court: I see. Now, how many other points did you have up? Was this the last point, No. 20? I notice they go in order down the line.

A. Well, without going through this entire thing I wouldn't [1249] be able to tell.

The Court: At least, it was one of the major points of difference?

A. Yes, this was a major point, yes. And item 20 he has—Ringo has noted as being "Story on merchandise purchased from Goodman in 1944, as follows:"

The Court: That is his writing?

(Testimony of Seth L. Root.)

A. Yes, all this is his writing.

The Court: All right. Then he goes on—how does he go on?

A. "January 10 of 1944, 3 cashier's checks at \$2,250 each, \$6,750 total."

The Court: Those checks have been referred to in evidence?

A. Yes.

The Court: They are before us.

A. Yes.

The Court: All right.

A. January 22, 1944, three cashier's checks at \$2,250 each, \$6,750.

Q. All right.

A. January 22, 1944, three cashier's checks at \$2,350 each, \$7,050.

The Court: Those checks are before the Court and the Jury here? [1250]

A. Those are the nine checks that Mr. Carroll produced.

The Court: And you had inspected those checks at the time that you had this discussion?

A. Yes.

The Court: You had knowledge of them?

A. Yes.

The Court: All right.

A. For a total of \$20,550. And then in Mr.—

The Court: And that is the very item we have here, \$20,550, that we have been discussing throughout the trial?

A. Yes, sir.

(Testimony of Seth L. Root.)

The Court: All right. Now, go ahead.

A. Then in further Mr. Ringo's handwriting:
"Goods received as follows:

"5/25/44, \$1610——"

The Court: Pardon me. Where do you get the information as to the date of arrival of the goods? From the invoices which you have referred to in your testimony?

A. Yes. I furnished him no information as to the dates of arrival, because I—we were unable to obtain from express company records the exact dates that they arrived. We had——

The Court: Do those dates reflect the dates on the invoices?

A. Yes, sir. Those are the dates on the invoices.

The Court: And you had those invoices? [1251]

A. Yes, sir.

The Court: And you received them from Mr. Blanchard?

A. Yes, sir.

The Court: And you in turn conveyed that information to Mr. Ringo?

A. To Mr. Ringo, so that it would aid him in the preparation of his work.

The Court: All right. How much is that first item?

A. May 25, 1944, \$1,610. June 8th, 1944, \$9,200. June 14th, 1944, \$690.

Then he has a note, "Balance ?\$9,050" for a total of \$20,550. That completes item 20.

(Testimony of Seth L. Root.)

The Court: What is the significance of the question mark?

A. Well, I assume Mr. Ringo—that is a question he had in his mind as to what happened to the balance there. He evidently made the assumption that——

The Court: Didn't you give him all of the invoices?

A. I gave him all the invoices that I had at that time.

The Court: Did that include the last item?

A. No, the balance is the question mark. We had no invoices for that. We had invoices just for the first three.

The Court: The first three?

A. Yes. [1252]

The Court: You did not have an invoice for the last item?

A. No, sir.

The Court: That clarifies it in my mind. It wasn't clear. And then what became of the invoices?

A. We still have them in our file.

The Court: But you could not find the last invoice?

A. No, sir. If you recall, there were some goods received earlier, January and February of 1944, but we were unable to tie them in with any records of this man Goodman back in New York, whose records were very scanty and incomplete.

(Testimony of Seth L. Root.)

The Court: Are there any further questions on this item?

Mr. Lewis: None.

The Court: Are there any further questions?

Mr. Shelton: Would Your Honor indulge me just one moment?

Q. (By Mr. Shelton): Mr. Root, I hand you two photostatic copies of documents and ask you if you had those documents during your investigation? A. Yes, I had these.

Mr. Lewis: Could I look at them?

Mr. Shelton: I want the Court to see them, too, before I proceed further, Mr. Lewis.

Mr. Lewis: Oh, these are just the invoices.

Mr. Shelton: Mr. Clerk, would you hand these to the Court? [1253]

The Court: You wish these marked?

Mr. Shelton: No, Your Honor, not at this time. I was going to ask the witness about them after Your Honor had seen them.

Mr. Drewes: May we question the witness with respect to those two documents?

The Court: What?

Mr. Drewes: May we question the witness with respect to those two documents?

The Court: Certainly.

Q. (By Mr. Shelton): Mr. Root, where did you get these photostatic copies that I have showed to you in the court here?

A. From special agent Blanchard.

Q. And do you state that these are invoices?

(Testimony of Seth L. Root.)

A. Yes.

Q. What is the error on one of them, which you referred to a moment ago?

A. I have this one invoice here dated June 8th of 1944 which shows 400 sailor suits at \$2,300. The extension is \$9,600 on the invoice, but Mr. Ringo has apparently taken upon himself to correct the extension.

Mr. Hagerty: I object to that, Your Honor.

The Court: I will strike that.

Q. Is it an error in the extension? [1254]

A. On the invoice.

Q. All right, on the invoice. How is it reflected in his report? A. He shows it as \$9,200.

Q. As the corrected item?

A. Correct extension.

Q. (By Mr. Shelton): Mr. Root, were these invoices that I have shown you included in the material which you summarized for Mr. Ringo on Exhibit 45?

Mr. Hagerty: I will object to this, Your Honor, any further questioning on these documents. They are not the originals, they are not the best evidence, and they are not in evidence.

Mr. Shelton: The Government will offer them in evidence.

Mr. Hagerty: We object to them.

The Court: They may be marked.

Q. Was this the source of your information?

A. Yes, sir.

(Testimony of Seth L. Root.)

Mr. Hagerty: They are hearsay, Your Honor.

The Court: What?

Mr. Hagerty: They are hearsay. He did not get the originals. These should have been introduced by the witness Blanchard, if they were the originals. He has been on the stand here. He says he got these from the witness [1255] Blanchard.

The Court: I am merely trying to clarify in my own mind this statement. We are dealing with photostatic copies. This gentleman that said that he gave information to Mr. Olender's former accountant upon which the former accountant predicated certain writings here. The simple question is, Did the photostats or the originals provide you with the source of information upon which you predicated the writings of Mr. Goodman?

The Witness: The photostats.

Q. These to which reference has been made?

A. Yes, sir.

Q. Did you ever at any time have the originals in your possession?

A. No, sir, they are in New York.

Q. They were in Goodman's possession, were they?

A. Yes.

Q. You photostated them?

A. I didn't photostat them.

Q. Mr. Blanchard did?

A. Those photostats, I believe, were made in New York and sent to Mr. Blanchard.

(Testimony of Seth L. Root.)

The Court: I will admit them in evidence.

Mr. Drewes: There is a certification on both documents by revenue agents.

Mr. Shelton: A special agent named Duffy, a New York [1256] special agent.

The Court: They may be marked.

(The documents referred to were thereupon received in evidence and marked U. S. Exhibit No. 66.)

Mr. Hagerty: If Your Honor please, may the record show that we object to them.

Q. (By Mr. Shelton): Mr. Root, I will ask you whether or not you ever showed the defendant Milton Olender these two photostats which have just been introduced in evidence?

A. No, sir, I don't believe so. I believe that Mr. Ringo inspected them.

The Court: Where is the third invoice? There was another invoice, wasn't there?

Mr. Shelton: Your Honor, I do not recall that there was a third one related to those two. I may be in error.

The Court: All right.

Q. (By Mr. Shelton): Will you state the dates of those two invoices, Mr. Root, and the amounts of the purchases as shown on the invoices?

A. June 8th, 1944, \$9,600.

Q. And the other one?

A. The other one, June 14th, 1944, \$690.

Q. Would you also read the price of the suits

(Testimony of Seth L. Root.)

on first the June 8th invoice and then the June 14th invoice, Mr. Root? [1257]

A. On the June 8th invoice there are 400 18-ounce suits at \$23 each.

Q. On the June 14th invoice?

A. June 14th invoice there are 30 18-ounce suits at \$23 each.

Mr. Hagerty: If Your Honor please, I am going to renew my objection and ask that everything be stricken from the record with reference to these records and that the Jury be instructed to disregard them, and the District Attorney cautioned against this conduct.

The Court: What is the basis, counsel, of your motion?

Mr. Hagerty: The basis is that it is our understanding, as gained from the case, that the inspector, Mr. Blanchard,—

The Court: Yes.

Mr. Hagerty: This man Goodman in New York became under questioning because of black market dealings.

The Court: Counsel, I know nothing about that.

Mr. Hagerty: That was involved.

Mr. Drewes: If your Honor please, it is quarter to 12. I wonder if it would be more appropriate to discuss this matter out of the presence of the Jury.

The Court: Yes, I feel in a measure I brought this matter—

(Testimony of Seth L. Root.)

Mr. Hagerty: I think the Jury should hear it, your Honor. [1258]

The Court: I can't see the reasons for any particular objection. Your associate, Mr. Lewis, sponsored that very part of the exhibit with respect to the amounts in question, the dates, and so forth.

Mr. Hagerty: That is true.

The Court: Only a moment ago.

Mr. Hagerty: That is true.

The Court: It is not clear in my mind—perhaps I am obtuse—perhaps I have had too much arithmetic in the last two weeks. It wasn't clear in my mind; I daresay the jurors' minds become befogged, and I say that respectfully. You can't sit here day in and day out without becoming case hardened to figures. It was not clear in my mind as to the source of the information, and particularly it was not clear to my mind when this witness said that he did not know whether the invoices in question referred to the Goodman transaction or not. That was in response to Mr. Lewis' questions. Yet on the other side of the controversy he said he did identify them as the Goodman invoices. Therefore I wanted some clarification in my own mind. Therefore I brought this transaction before this particular witness as he read from the statement, and I then asked him to clarify the last part thereof, wherein it appears that there is a question mark. I did not know the significance of the question mark until this very minute. Perhaps it escaped me during the trial, but here "balance, [1259] question

(Testimony of Seth L. Root.)

mark, \$9,050." I asked him if he knew the significance of that. He said that apparently was a construction of a Mr. Accountant—what is the name?

Mr. Hagerty: Ringo.

The Court: Yes. I asked him if there was an invoice in that item and he said he had not seen it. That was about the sum and substance of it. Next then is the photostatic copies are withdrawn from the Government's files. They are produced. I had not seen them before.

Mr. Hagerty: They were presented to the defendant while he was on the stand and he said he had never seen them, the originals, and he had never seen the photostats, of course.

The Court: That may well be.

Mr. Hagerty: If they were to prove this, I would feel that Mr. Goodman or someone in authority in his place should be brought here to identify them and establish that this transaction occurred.

Mr. Shelton: Your Honor will recall that the record shows the witness Goodman was ill and unable to attend, although subpoenaed.

Mr. Hagerty: This matter was under investigation for several years. In that length of time provision could have been made, either by deposition or alternates of some sort from his organization, to prove these things, if Goodman himself could not appear. [1260]

Mr. Shelton: This was a matter opened by defense counsel, as your Honor indicated, and then when it was opened, we were entitled to introduce

(Testimony of Seth L. Root.)

this further evidence as bearing on the matter introduced in evidence by the defense.

The Court: As I recall the record, Mr. Hagerty—and in intruding myself I want the jurors to know I am not reflecting on either side of this controversy, be it the defense or the prosecution; I am charged under the law as being an impartial arbiter of the law; you in turn sit there as impartial arbiters of the fact. We approach our duties and our work impartially, dispassionately, and, I hope, fairly. This, after all, is not an academic discussion. Within the last thirty minutes Mr. Lewis asked that the Court mark a certain part of this exhibit as being sponsored by him. I then stated that it made very little difference who sponsored the exhibit for the reason that the interrogation of this witness acted as an explanatory note concerning the so-called story on the merchandise purchased from Goodman. Now, the story unfolded. Then I asked the witness to read this part of the exhibit, which of course he did read. I then asked the question about the balance, and he stated that that was the reconstruction of the other accountant. Then the photostatic copies were produced. The photostats were identified by this witness.

Q. Is that correct? [1261] A. Yes.

The Court: Your objection, Mr. Hagerty, is that the photostats should be stricken from the record and that all of this testimony should be stricken as prejudicial and inflammatory?

Mr. Hagerty: Yes, your Honor.

The Court: What is the basis?

(Testimony of Seth L. Root.)

Mr. Hagerty: Our basis is this, as Mr. Blanchard testified, this investigation originated with Mr. Goodman, who was under investigation by the Federal Government. In the course of the investigation they spread out to everyone who ever had any transaction apparently with him, including this defendant. These records then presented to the defendant while he was on the stand, he under oath has said he has never seen them. He does not know them.

The Court: That was part of the defense.

Mr. Hagerty: Yes—no, under cross-examination by the Government. They were presented to us through the defendant, and, of course, we did not know what they were. The defendant said he had never seen them before. The Government is now getting them into the record by circumventing the normal and established way of introducing them into evidence. There is no one here to prove the originals. There is no one here from the organizations with the invoices to establish them in any way, and Mr. Goodman has been under investigation long [1262] before this case against this defendant was started. So provision in my mind should have been made to establish those things. They brought other men from New York. Why couldn't they have brought his auditor and book-keeper to establish the originals? Why couldn't Mr. Blanchard have been questioned about it when he was on the stand? I think the whole thing is hearsay.

(Testimony of Seth L. Root.)

The Court: I will hear you out further on both sides. The Jury is excused. We will resume at 2:30 this afternoon with the same admonition not to discuss the case under any circumstances and not to form an opinion until the matter is submitted to you.

(The Jury was excused, and the following proceedings were had in the absence of the Jury:)

The Court: Mr. Hagerty challenges the Government's position here. What is your answer to that, counsel?

Mr. Drewes: Preliminarily, your Honor will recall that very early in the trial I advised your Honor that the witness Goodman was in Miami Beach, Florida, ill. I produced a letter from a physician to that effect. He could not attend the trial. That letter was made a part of the record at the request of the Government. We are advised that the files of the George Goodman Company are in the custody of its attorney in New York. How we could establish the authenticity of his records in the absence of Mr. Goodman we are at a [1263] loss to know.

The Court: Where is the agent who made the photostat, whose legend appears on the reverse side? Where is he?

Mr. Shelton: We are not sure he is still employed by the Bureau.

(Testimony of Seth L. Root.)

The Court: Wasn't that a comparatively simple thing to determine?

Mr. Shelton: We could have determined that, your Honor. We had not expected to carry it to this point until the defense brought this transaction into issue as they have, and we thought that opened it up for us for that reason.

The Court: As I understood you, Mr. Shelton, you indicated for the record at least, that you were taken somewhat by surprise as the result of the nature of the defense asserted, is that right?

Mr. Shelton: We had not expected that this increased inventory as of December 31, 1944, would be claimed. As your Honor knows, it was only the second Thursday of the trial that we were told the defense would claim an additional \$20,550 of opening inventory and offset against net income. On the second Tuesday of the trial Mr. Lewis stated right here he was not offering the inventory evidence for the purpose of impeaching the stipulation, and it was only on the ninth day of the trial that we found that out.

The Court: That is a fairly [1264] accurate statement.

Mr. Drewes: Further, as I recall the questions and answers that were propounded to the witness Root as they pertained particularly to these two documents, he was asked if he had furnished the information to Ringo.

The Court: Yes.

Mr. Drewes: He was asked if he could identify or tie together the information shown on Exhibit

(Testimony of Seth L. Root.)

45, which he had given to Ringo, with the original Goodman transaction. He said he could not. He was asked upon what he relied in giving that information to Ringo, and he relied, as he has testified, on these two documents. I think they are admissible.

Mr. Hagerty: I am not so sure of that. Was it your Honor who asked him that?

The Court: No, Mr. Lewis asked him that specific question, and I was, I suppose, jolted out of my lethargy because I could not quite orient myself to the answer given in response to Mr. Lewis' question that he did not or could not say that the transactions in question had to do with the Goodman matter. Yet, on the other hand, the witness said in response to the Government's phase, that he did orient himself, he could assimilate it, he could point it up to the Goodman matter. If you want the record read on it, I will have it read. Am I accurate or inaccurate?

Mr. Lewis: I think you fairly stated it.

The Court: I think my analysis of how it developed was [1265] fair. I am not going to inject error into this record. We have had a long trial and I want to be extremely careful about any approach I make to these matters, because I come back to my reminder that the Court should keep himself completely removed from sponsoring or stimulating the introduction of any exhibits. I did ask this gentleman where the invoices were, did I not? And they were produced. Photostats were produced. Then

(Testimony of Seth L. Root.)

counsel for the Government indicated on the reverse side there was an agent's name. That agent had taken these photostats from the originals.

Mr. Lewis: The record shows that they were twice removed, your Honor. He got them from Blanchard, Blanchard evidently got them from some other Government agent.

The Court: May I see those, please?

Mr. Hagerty: The way we feel about it, your Honor, in the absence of the Jury, this fellow Goodman apparently was engaged in black-marketing, and when he felt he was under investigation, he made up lots of invoices apparently to try to cover his shortages. This may be some of them.

Mr. Drewes: That is a bald assumption.

Mr. Hagerty: Yes, but that is our theory of the thing, because our defendant cannot recognize him, has no knowledge of him, and certainly Mr. Goodman is under investigation.

Mr. Shelton: Your Honor, again in the absence of the Jury, the fact that this defendant kept no records might indicate [1266] that he, too, was in black marketing and that was a good reason for not keeping the records of the transaction until the end of 1945.

Mr. Hagerty: He had records.

Mr. Shelton: Not on his books.

The Court: May I ask you a couple of questions?

Q. You asked the defendant, Mr. Olender, or,

(Testimony of Seth L. Root.)

to your knowledge, Mr. Blanchard asked him for the invoices in the Goodman transaction, did you not?

A. I did not. Mr. Blanchard asked him for his dealings with Mr. Goodman.

Q. And the defendant could not or did not produce any invoices?

A. He produced one invoice that I believe he said was in substance——

Mr. Shelton: That \$1300 invoice.

The Court: I remember that.

Mr. Drewes: He has testified he had no others.

The Court: Then on cross-examination counsel confronted the defendant with the photostats and asked him if he had ever seen the originals.

Mr. Drewes: That is right.

The Court: He denied it.

Mr. Drewes: He denied it.

The Court: All right. The next event concerning the [1267] photostats is the recent event on which the Court queried this witness. The witness states that he received these photostats from another agent, that he in turn conveyed the information to the accountant then employed by Mr. Olender, and that accountant prepared, in part at least, U. S. Exhibit No. 45. Apparently Mr. J. A. Duffy compared the original with this copy, and this is a photostatic copy and Mr. Duffy is special agent.

Mr. Shelton: Special agent or former special agent in New York, according to my understanding, your Honor.

(Testimony of Seth L. Root.)

The Court: Where did you get the item of \$1,610, Mr. Witness?

A. I believe there is another invoice somewhere in our file. Is that the one that is missing?

Q. Yes, 5/25/44.

A. I believe there is another invoice back there.

Q. There must be. That would leave open only the item of \$9,050, which is a reconstructed item.

The Witness: During a time subsequent to this we received other invoices which we were able to tie in with express receipts.

Mr. Drewes: I believe we have it here, Mr. Root. Will you see if that is the one you referred to?

The Witness: No.

Mr. Drewes: Isn't there a correction on there for [1268] commission making up the \$70 commission? Item 1610.

The Witness: May 25th, that first one, your Honor. That would be this one.

Mr. Drewes: I believe that the document the witness has in his hand now, your Honor, is the missing invoice.

Mr. Shelton: Pass it up to the Court, Mr. Root.

The Court: This apparently was a transaction from Seagoing to Goodman and Goodman in turn shipped to Olender.

The Witness: That is where Mr. Goodman was buying his suits from Seagoing Uniform.

The Court: Did Goodman take a small profit on the transaction?

The Witness: That is our information, that he

(Testimony of Seth L. Root.)

turned them over for a small commission.

Mr. Hagerty: The testimony of the defendant was Leavy got a dollar and Goodman got a dollar acting as the agent.

The Court: What is your view of the state of the record as it now appears before the Court?

Mr. Drewes: My view is simply this: The gist of the matter, from a evidentiary point of view, is the source upon which the witness, Mr. Root, relied in giving the information which he did to Mr. Ringo, all of which was brought into the record by Mr. Lewis. The question was asked of him, could you identify or tie in the information which you gave to Mr. Ringo to the original Goodman transaction, and [1269] he said no, he could not. Why not? The answer is the documents the Government has since produced in evidence.

The Court: Why couldn't you tie these in to the Goodman transaction?

The Witness: We just have no records to support that they were part of it, and there might have been other orders. We have several other invoices, the express receipts, showing the receipt of goods from Goodman also, and they just don't tie in entirely with this \$20,550.

Mr. Drewes: There is also the date again, is there not, Mr. Root? These are June invoices.

The Witness: Yes, they extend from January clear through to June. In fact, the invoices show more money than the \$20,000.

The Court: If you notice on one of the invoices

(Testimony of Seth L. Root.)

there is a marking, "30 suits will follow." Then "This completes order." What significance do you attach to that?

The Witness: He evidently had put in an order for a certain number of sailor suits and this notation is that he completed the order.

The Court: Then if you follow that down you find 30 suits is the next item, and you have incorporated that in the other memorandum there as the third item, haven't you? Thirty suits represent the third item on that sheet.

The Witness: Yes. The thing that is put on here, was [1270] put on here by Mr. Ringo, and furnished the——

The Court: I may be obtuse. The thing I cannot clarify in my mind is how—if you cannot correlate these transactions perfectly, in the light of the photostats and the invoices, and in the light of all the facts as we know them in the Goodman transaction, how could you at that time tell this accountant that these items were part and parcel of the Goodman transactions?

The Witness: I did not tell him that they were part and parcel of the Goodman transaction, your Honor.

The Court: What have you got there?

The Witness: I put down that we had certain invoices from George Goodman to aid him in possibly refreshing Mr. Olender's memory on this. We do not know.

(Testimony of Seth L. Root.)

The Court: And then he assumed to put them under the legend, "Story of Goodman transaction."

The Witness: Yes. This is something that he has worked out himself.

Mr. Shelton: If your Honor please, bearing on your question about whether these tie in, the record will show, it is my recollection, that the defendant justified that many of these suits, if not most, were received in February and March, after the January order, which would be an indication that the shipments were not received as late as June or at least some indication. [1271]

The Court: Gentlemen of the prosecution, if this witness cannot correlate the invoices with the Goodman transaction, that is, the \$20,550 item, how would the Court be justified in permitting these invoices to go to the Jury?

Mr. Drewes: It is our theory of the case that there were other unreported sales.

The Court: What?

Mr. Drewes: There were other unreported purchases from George Goodman.

Mr. Shelton: The Government is entitled to disprove the defense contention if it can. We view these invoices as some evidence that the defense contention in this matter has no merit.

Mr. Hagerty: If the Court please, there is a proper way of doing that, that is, to identify the originals from Mr. Goodman himself or from the man in his office that made the originals and made the shipment.

(Testimony of Seth L. Root.)

The Court: The man in the office may not be available. The agent may be available.

Mr. Hagerty: Or Mr. Goodman. His deposition could be taken.

Mr. Drewes: The question before the Court is whether the two documents are admissible evidence under the circumstances under which the offer was made. Mr. Lewis opened up the question, and it follows from that, upon what did you rely [1272] in giving this information to Mr. Ringo? Secondly, how do you know that they were not tied in to the original \$20,000 purchase? The answer is, I had in my possession other invoices that I could not identify, could not tie into. That is the issue.

The Court: We are dealing with secondary evidence, photostats.

Mr. Drewes: There is no question about that.

Mr. Hagerty: Our position was pretty well established in Court as to the theory. The theory of, the theory of exchanges that Government counsel went into when Mr. Blanchard took the stand.

Mr. Drewes: Mr. Blanchard can't add anything to the matter.

The Court: In view of the present state of the record, I will mark them for identification. It was not counsel on either side; it was the Court who asked for these invoices. Have you made any determination as to where Duffy is?

Mr. Shelton: No, your Honor.

The Court: How long would it take you to do that?

(Testimony of Seth L. Root.)

Mr. Shelton: We could send a teletype and find out if he is still employed there. If not, they have his address. I might respectfully say to your Honor in that connection the Government expects to call only one witness after Mr. Root and he is a very short witness. If we find Mr. Duffy was [1273] available, it would mean his coming out by train or plane if he were to come.

The Court: Mark them for identification, presently, gentlemen. I will give further thought to the matter.

(U. S. Exhibit 66 was thereupon marked for identification only.)

Mr. Shelton: Your Honor, while we are out of the presence of the Jury, may we show you some other invoices here which the agent tells me represent January and February deliveries?

The Court: Can you have an independent check made on Goodman to determine the state of his health? Did you accept their doctor's statement as to the state of his health?

Mr. Shelton: No, we had further correspondence, your Honor, when this became quite important. We got the special agent's office to send a telegram to Miami, and the report received was that Mr. Goodman was receiving adrenalin. He was down to a weight of somewhere around 100 pounds, as I recall it, and the indication was that he was very seriously ill.

(Testimony of Seth L. Root.)

Mr. Hagerty: As a result of that you got this letter back from the doctor?

Mr. Shelton: The letter came from the doctor first early in the trial, before the trial began. We issued the subpoena and got the doctor's letter. At a later time in the [1274] trial we had the special agent's office in Miami in contact with us and they came back with the report about the adrenalin and the loss of weight.

The Court: These are shipping tags.

Mr Shelton: Yes, your Honor.

The Court: I will rule on it later. We will resume at 2:30.

(Thereupon an adjournment was taken until 2:30 p.m. this date.)

October 7, 1952, 2:30 P.M

(The following proceedings were had outside the presence of the Jury:)

The Court: Gentlemen, in connection with our discussion preceding the noon hour, and with particular regard to the admissibility of the photostatic copies of the invoices in question, I have had the benefit of some relaxed moments and also have had occasion to review the authorities as well as look upon the evidence thus far as it has unfolded as well as the testimony of the gentlemen on the stand, and I believe that under the circumstances, as the records are now posed before me, that they are inadmissible.

(Testimony of Seth L. Root.)

Accordingly I sustain the objection interposed, and they may be marked for identification.

Mr. Hagerty: At the same time then we will renew our motion to strike from the record the testimony relating to them and ask that the Jury be instructed to disregard same.

The Court: Well now, on that point, the admissibility of the photostatic copies of the invoices, in my opinion at least, is not so interwoven with the testimony of this witness, with this gentleman that it would warrant the Court in striking from the record the testimony of this man. The agent testifies—pardon me, your name—

The Witness: Root. [1276]

The Court: Mr. Root, the agent, testifies that as to the photostatic copies he cannot tell to a certainty and under oath that they bear strictly upon the Goodman transaction. Now he has answered that in response to cross-examination on the part of Mr. Lewis, and he answered it as well as in response to a question I directed to him, and that in part at least is one of the reasons why I am not admitting the documents in evidence. That is one of the reasons.

Mr. Hagerty: Your Honor—

The Court: Mr. Hagerty, if you will permit me. The record as it now has unfolded is of that character wherein, again we come to credibility, do the jurors believe that the Goodman transaction is as it has been delineated by the defendant. This gentle-

(Testimony of Seth L. Root.)

man cannot state categorically and under oath that the invoices bore upon the Goodman transaction. All he can testify to is that he turned over such information as he had to the accountant for the defendant and the accountant for the defendant attempted to reconstruct the matter. That is about the best there is.

Now that being so, I think it would be an abuse of my discretion if I allowed the invoices in.

But at the same time the testimony of this witness is before the Jury and the Court for whatever it is worth as to the related facts because they were brought out by [1277] Mr. Lewis and, if you will examine the record, and I am quite sure the record will bear me out, Mr. Lewis asked him the question in cross-examination or on direct examination, whatever it may have been: "Can you determine precisely that these invoices bore upon the transaction?" He said, "No."

It was then that I perhaps wittingly or unwittingly groped for the invoices and it was then that they came out of the Government's file, and under the circumstances I don't believe there is anything to strike from the record.

There is only one question posed before me and that is the prime one, that is, the admissibility of these invoices.

Mr. Hagerty: As I recall it, your Honor, Government counsel, Mr. Shelton, asked him: "Can you tie these in—indicated deliveries of goods—in

(Testimony of Seth L. Root.)

with the Goodman transactions as testified to by the defendant?" He said, no, he couldn't.

The Court: He said, no.

Mr. Hagerty: Then Mr. Lewis asked him:

"Can you say that they are not connected with it?" And he said, "No, I can't." So then Mr. Shelton brought forward, started his examination of his own witness in reference to the photostat and started testifying to and from data on the photostat. That is the part I want stricken.

The Court: Which data is correlated with 51—is that [1278] the Exhibit number?

Mr. Hagerty: 45.

The Court: With No. 45, which is in evidence. Now, if 45 had not been in evidence, there might be something to strike. But as I view the record, there is nothing to strike from the record. That is in the evidence and it was Mr. Lewis who brought out the relationship between the invoices and the latter part of that exhibit, which you hold in your hand, which is number——

Mr. Hagerty: Mr. Lewis in so many words never mentioned the invoices. He simply responded on cross-examination to a question directed by Mr. Shelton. Mr. Shelton said:

"Can you tie this transaction into the Goodman transaction?"

He said, "No." Mr. Lewis said:

"Can you say it was not connected with the Goodman transaction?"

He said, "No."

(Testimony of Seth L. Root.)

The Court: But, Mr. Hagerty, you may recall that basically and underlying this surface discussion there was the prime predicate of the invoices. Isn't that correct, Mr. Witness?

The Witness: Yes.

The Court: Isn't that what we were discussing, the invoices? [1279]

The Witness: Yes, sir.

The Court: And it was then that perhaps, in a zeal to bring before the Court and the Jury all of the facts, that I brought out the photostatic copies of the invoices. Now those invoices had been presented to the defendant. He denied categorically that they bore upon any transaction which he recalled. They are vagrant documents, in my opinion, and have no place in the record. But there is nothing to strike from the record as the evidence unfolded, and that is my ruling.

Mr. Drewes: If your Honor please, I have an amended supplemental instruction which I will ask your Honor——

The Court: I will add one thought, Mr. Hagerty, in point of fairness to you and the Government as well. If after a review of this record this evening you feel that there are specific parts of the narrative that unfolded that should be stricken, I will entertain a motion in the morning. I can't certainly collect the record now as it appears. Similarly, to the Government, if there is any error, any prejudice that might have crept in as a result of what I did,

(Testimony of Seth L. Root.)

I am willing to strike it, but I think thus far there isn't.

Mr. Hagerty: That will be most fair, your Honor.

The Court: Will you call the Jurors in?

Have you submitted a copy of the supplemental instruction [1280] to the opposition?

Mr. Drewes: Yes.

The Court: This is a better phrasing. I will go over it at my convenience.

(The following proceedings were had in the presence of the Jury:)

The Court: You may proceed, gentlemen.

Mr. Shelton: If your Honor please, the Government has no further questions of Mr. Root.

Mr. Lewis: No further questions.

Mr. Shelton: You may come down, Mr. Root.

(Witness excused.)

Mr. Shelton: Mr. Mytinger, will you take the stand, please?

HUBERT C. MYTINGER

recalled on behalf of the Government, previously sworn.

The Clerk: Mr. Mytinger, will you please restate your name for the record?

A. Hubert C. Mytinger.

Direct Examination

By Mr. Shelton:

Q. Mr. Mytinger, you have appeared previously and have testified you are a certified public accountant? A. I have.

Q. And you were in Court this morning when Mr. Carroll of the [1281] Bank of America produced the two loan application records which are here on the blackboard? A. Yes.

Q. I will ask you, Mr. Mytinger, to take defendant's Schedule 4 as revised and to compute from the figures appearing there the amount of cash that the defendant claims was in his safe deposit box on July 11, 1945?

A. The nearest date that appears on schedule 4, as I believe it is known, is June the 9th.

The next date is August the 27th.

As of June the 10th—

The Court: Pardon me, Mr. Shelton. The jurors are looking at the records. You might give them an opportunity to find that. Do you all have

(Testimony of Hubert C. Mytinger.)

that schedule now? Schedule 4, is it—is that the number? A. Yes.

The Court: You are reading from a note of June 9th, the notation?

A. The last entry, June 9th, and then the next is August 27.

Q. (By Mr. Shelton): Now, Mr. Mytinger, in that computation made from the defendant's schedule, I would like to have you allow for the withdrawals shown as of June 9th, but not for the withdrawal as of August 27, and compute the balance in the intervening period which would cover July 11, 1945? [1282]

A. The balance would be \$61,347.43.

The Court: What does that figure represent now?

A. The balance of cash in safe deposit box after the withdrawal of June 9.

The Court: According to Schedule 4?

A. That's correct.

The Court: And you get that in juxtaposition to July 11, 1945?

A. That is the indicated——

The Court: ——wherein allegedly a loan was made?

A. Yes.

The Court: By the bank?

A. Yes.

Q. (By Mr. Shelton): Now, Mr. Mytinger, I would like to have the same computations made for August 22, 1946, on two assumptions. First I will

(Testimony of Hubert C. Mytinger.)

ask you to assume that there is not in evidence in this case the I. Magnin and Gray Shop items down at the bottom of the page, which I believe the record will show his Honor struck, and for the purpose of the first computation I would like to have you assume that the item near the bottom of the page, "Non-deductible expenditures included in stipulation" of \$1340.40 represents money which was expended from the box prior to August 22, 1946, and I will ask you to compute the cash in the box as of the defendant's schedule on that date on that assumption. [1283]

A. Again, the last entry is July the 10th. The next entry is September 18th. So between those two dates—making the assumptions as you have given them—there would be a balance of cash of \$17,939.76.

Q. Now, Mr. Mytinger, I will ask you to make the same assumptions as before, except to assume that the non-deductible expenditure item of \$1340.40 was expended after August the 22nd, 1946. Will you give me a similar cash figure derived from defendant's Schedule?

A. The cash figure would then be \$19,280.16.

Q. \$19,280.16? A. Correct.

Q. Assuming that the net worth method is being used to compute taxable net income, Mr. Mytinger, and assuming that the defendant kept no records of cash going into or coming out of the safe deposit box and assuming further that the defendant had at

(Testimony of Hubert C. Mytinger.)

least five known sources of taxable income, is it in your opinion correct procedure for an accountant for the defendant to limit the sources from which cash was received without proper verification of possible sources of cash and the amounts of cash coming therefrom?

A. I didn't understand the last part of your question, Mr. Shelton. What is the question?

The Court: I think if you will just strike the amount of "cash coming therefrom." That confuses the last part. [1284]

Mr. Shelton: Let me restate it, your Honor.

Q. Assuming that the net worth method is being used to compute taxable net income, Mr. Mytinger, and assuming that the defendant kept no record of cash going into or coming out of the safe deposit box, and assuming further that the defendant had at least five known sources of taxable income, is it in your opinion correct procedure for an accountant for the defendant to limit the sources from which cash was received without possible verification—without proper verification of possible sources of cash? A. My answer would be no. [1285]

Mr. Lewis: Your Honor, I would like to have that stricken because without "proper verification" I don't know what that means.

The Court: Overruled. We have had definitions of "verification" in the record. Is that the definition upon which you base your question?

Mr. Shelton: Yes, your Honor. The definition worded by the accountant for the word verify.

(Testimony of Hubert C. Mytinger.)

The Court: All right.

Q. (By Mr. Shelton): Assuming, Mr. Mytinger, that no record was kept by the defendant of amounts deposited in and withdrawn from his safe deposit box and assuming further that the defendant had at least five sources of taxable income, and assuming that complete records of the disposition of his income from all sources have not been kept and assuming that there is evidence that the defendant's business records do not reflect all his sales, and assuming that money was withdrawn from the defendant's business and used for business and other purposes without any indication on his records of the purposes for which the money was used, would it in your opinion be sound accounting practice to assume that all unidentified or unreported deposits or expenditures of cash by the defendant came only from his safe deposit box? [1286]

Mr. Hagerty: We will object to the question, your Honor, on the ground that it assumes certain facts not in evidence. There is evidence here that the defendant kept records of his business, kept records of his transactions, and this is an attempt to usurp and evade the province of the jury. That is a question for the jury to decide.

The Court: Overruled.

A. My answer would be no.

Mr. Shelton: You may examine.

(Testimony of Hubert C. Mytinger.)

Cross-Examination

By Mr. Lewis:

Q. Mr. Mytinger, as a certified public accountant with years of experience with the Bureau of Internal Revenue, did you ever see where the in and out records of a cash deposit box were not kept on a daily basis, did you ever see it verified.

A. Do I understand you to ask, did I ever see such a record kept or do I know of cases where it was not kept?

Q. Do you know of cases where it was not kept?

A. Oh, yes.

Q. Has the Government in any of those cases ever been able to verify **on its own**?

A. I would say yes, sir, in some cases, Mr. Lewis.

Q. You mean that you could verify the amounts when no records were kept going in and out of the A-box?

A. That's correct. [1287]

Q. How?

A. Well, it would depend upon the case. If the source was limited to relatively few sources, one or two, and third party records were available, and the same transactions were handled in the same manner, and merely the proceeds put in the safe deposit box, it would be a very simple matter then to verify it.

Q. Will you name the sources that the Government in its investigation from which Mr. Olender

(Testimony of Hubert C. Mytinger.)

received income during the years 1944, 45 and 46?

A. Yes. There is the Army and Navy Store, dividends, interest, partnerships, sales property. There may be others, but those five, I believe——

Q. Those are the one you know of?

A. That's right.

Q. Now, why would it be simpler if there were only one or two sources to verify than when you have four or five sources?

A. It would be simpler in the process of verification, Mr. Lewis. There would be fewer sources from the outside to examine perhaps, fewer possibilities of funneling off other than to this one box.

Q. Well, when you analyze this, the evidence in this case, there are not very many complex sources, are there?

A. I would say that is a matter of degree. There are some [1288] of them so complex that I don't believe the answer has been reached in court as to what happened to the funds.

Q. How many cases have you ever been on in all your years where no daily records, actual records, were kept, were you able to verify each and every withdrawal or most of them from a safety box?

A. Again now to what extent?

Q. To verify in the sense that an accountant— You were discussing sound accounting practice. Where you could certify that it happened that way.

A. My actions as an accountant for the Government in such investigations, Mr. Lewis, would not be the same, so far as responsibility is concerned,

(Testimony of Hubert C. Mytinger.)

that would be expected of an accountant. The Government, for instance, has the benefit of the burden, as you well know, in civil tax matters. So in a great many such investigations if we found no adequate record, the taxpayer would be charged with everything that we did have knowledge of and the burden would be upon him to prove it was not income.

Q. That is in a civil tax case?

A. That's correct.

Q. But that is not true in a criminal tax case?

A. No. As I told you, I believe yesterday, I made no verification in this case. The audit in this case was done [1289] by two other agents.

Mr. Lewis: That is all.

Redirect Examination

By Mr. Shelton:

Q. Mr. Mytinger, I believe you answered in response to a question by Mr. Lewis that you do not believe the answers have been received into court as to disposition of all funds accounted for, or words to that effect. Were you referring to the defendant's schedule 4? A. Yes.

Mr. Hagerty: Objected to as being leading and suggestive and again an attempt on the part of the counsel to summarize the witness' testimony. He summarizes his testimony and then puts words right in his mouth and asks him if that is what he meant. It is argumentative in form.

(Testimony of Hubert C. Mytinger.)

Q. (By Mr. Shelton): Will you state whether or not you were referring to schedule 4, Mr. Mytinger? A. In part.

Q. Would you be able to give some illustrations of the statement which you made on cross-examination to Mr. Lewis?

A. Yes. I recall Mr. Hellman's testimony, I believe, where he admitted that the items such as dividends and interest could have been considered as making up part of the deposits appearing on schedule 4. Likewise, I recall, [1290] only the defendant's testimony, that the amounts from the partnership in Fresno arrived in January of each year; it is possible that those items likewise might have been received at other times. Mr. Carroll's testimony this morning, I believe, tied a business check in with the \$15,000 withdrawal shown on schedule 4 with the purchase of four cashier's checks rather than cash from the vault.

Q. Mr. Mytinger, I will ask you whether or not in what you just said you were referring to defendant's Exhibit AD (AQ)?

A. Well, I didn't see this Exhibit at the time it was handed to Mr. Carroll, but I presume this is the check. It is the only one I have knowledge of coming in this morning.

Q. It is a \$15,000 check dated when, Mr. Mytinger? A. Dated May 24, 1945.

Q. And if the records should show that that check was introduced by the defendant this morn-

(Testimony of Hubert C. Mytinger.)

ing, by his counsel, would you then say that that is the check to which you referred?

A. Yes, I believe it also shows in the business record, in Defendant's records.

Q. Can you state in what respect you think this check illustrates what you just stated, Mr. Mytinger?

A. Well, we mentioned as possible sources certain possible [1291] taxable sources. Also accounting for some of the funds which may have been deposited in a personal account or may have been used for other expenditures, would come such funds as were withdrawn from business for personal use. This, I believe from the evidence now before us, is a personal withdrawal of the business and so recorded on the defendant's books. I believe Mr. Carroll further testified, and I believe the evidence will show, that that check is tied in with the purchase of the four cashier's checks on May 31, 1945.

Q. I will show you Government's Exhibit 63 and ask you whether or not that Exhibit includes the four cashier's checks that you just referred to?

A. Yes, it includes three others too.

Q. But it does——

A. It includes the four.

Q. It does include the four? A. Yes.

Mr. Shelton: You may examine.

(Testimony of Hubert C. Mytinger.)

Recross-Examination

By Mr. Lewis:

Q. Mr. Mytinger, I show you United States Exhibit 58, a deposit on June 1, 1945, and the Defendant's Exhibit number AC showing a deposit into the bank account of \$15,000, June 1, 1945, and United States Exhibit Number 64, cashier's check for \$15,833.46.

Now will you analyze those Exhibits and tell me where [1292] in your opinion the money came from for each one of them?

A. Well, starting with the first item, Mr. Lewis, U. S. Exhibit number 58, merely shows a deposit of currency in the Bank of America on June 1, 1945, \$15,000. It does not disclose the source of the currency.

On Defendant's Exhibit AC in very dim pencil notation there is a handwritten notation "Store check number 2396" or "3296"—"May 24th" opposite the deposit. However, I believe Mr. Carroll this morning explained that that store check went to buy four cashier's checks.

Q. Well, it is not possible that the store check could go to buy the cashier's checks and that the \$15,000 to the commercial account on 6/1/45 was cash from the box to buy the insurance cashier's check, U. S. Exhibit 64?

A. If there were cash in the box and if it were taken out on that date and deposited, I would say

(Testimony of Hubert C. Mytinger.)

it is possible this is the deposit. But I don't recall any specific testimony or evidence of that nature.

Q. But didn't Mr. Olender testify that the money that was not withdrawn through personal checks or store checks came from the box?

A. I believe he did, yes.

Mr. Lewis: That is all, your Honor.

Further Redirect Examination

By Mr. Shelton:

Q. Mr. Mytinger, do you have with you a copy of the defendant's schedule 4 as revised? [1293]

A. I believe this is the revised schedule.

Mr. Shelton: Mr. Clerk, do you have the number of that?

A. Defendant's Exhibit AK, I believe.

Q. (By Mr. Shelton): Mr. Mytinger, I hand you Defendant's Exhibit AK, which is schedule 4 of the defense's theory. I will ask you to direct your attention to May 31, 1945 and ask you whether or not there does not appear under that date four cashier's checks, the total amount being \$15,000?

A. There does. Those are the four checks that I previously testified to.

Q. And this schedule was prepared to reflect, was it not, that the amounts in the withdrawal column here represent money coming out of the safe deposit box and going into other forms?

A. That is my understanding.

Q. And from the evidence in this case, that is,

(Testimony of Hubert C. Mytinger.)

the documentary exhibits, will you state to the Court and the jury whether or not in your opinion the documentary evidence establishes that these four cashier's checks were purchased with money from defendant's safe deposit box?

Mr. Hagerty: Object to, your Honor, unless the Exhibits are specifically identified.

Mr. Shelton: I will invite your attention, Mr. Mytinger, [1294] to Defendant's Exhibit AD, (AQ) which you had a little while ago. Do you still have it?

A. No, I haven't.

Q. You do have it? A. I haven't.

Mr. Shelton: Your Honor, I took this to be a "D" before. May the record show that it is Exhibit AQ?

Q. Inviting your attention, Mr. Mytinger, to Defendant's Exhibit AQ, and to Government Exhibit 63. I will ask you whether or not it is indicated that \$15,000 used to purchase those four cashier's checks came from the defendant's safe deposit box?

A. The documentary evidence of itself does not so indicate, Mr. Shelton. However, Mr. Carroll testified, I believe, that the markings on the check indicated that it was a collection item which in his opinion represented the offset for the purchase price of these four cashier's checks.

Q. Well, based then on the documentary evidence and on Mr. Carroll's testimony, is it your conclusion that these four cashier's checks were

(Testimony of Hubert C. Mytinger.)

purchased with the check which is Defendant's Exhibit AQ?

A. Based solely on this evidence and that testimony, I would say yes.

Q. And if then the check was used to purchase those four [1295] cashier's checks, they were not purchased with money coming from the defendant's safe deposit box, were they?

A. That is correct.

Mr. Shelton: You may examine.

Mr. Lewis: No further questions.

Mr. Shelton: You may come down, Mr. Mytinger.

(Witness excused.)

Mr. Drewes: If your Honor please, there have heretofore been offered into evidence and marked for identification by the Government the 1945 partnerships return of the Fresno partnership, the 1946 partnership return of the Fresno partnership, the affidavit of Milton Olender filed in connection with the estate of his father, and the sworn statement of Milton Olender given before Bedford E. Blanchard.

At this time we ask that those four documents be admitted into evidence.

The Court: May I have the sworn statement before Blanchard?

Mr. Drewes: That is number 48, according to this record.

The Court: As to the other documents, the partnership returns and the like, I think that they may be admitted.

As to the interrogation before Mr. Blanchard, I

had it marked for identification. There were certain interpolations [1296] on the face of the document, as I recall, and it was never signed by the defendant.

Mr. Hagerty: It was never signed.

The Court: Do you have an objection at this time?

Mr. Hagerty: Yes, we object to it, your Honor.

The Court: The objection is sustained.

The other documents may be marked in evidence.

Mr. Drewes: I should be very reluctant to bring the Bureau stenographer over to testify from her notes taken at that time. I wonder if counsel might reconsider?

Mr. Hagerty: Well, there are definite interpolations pasted on.

The Court: There were such additions, counsel, as would prompt the court in requiring a basic foundation to be laid. There are additions to it in terms of paper cut out and added.

Mr. Hagerty: There were certain statements questioning the defendant which are in the record.

The Court: Mr. Shelton queried the witness on the stand. He elicited in response to those questions what I believe to be the crux of his examination.

Mr. Drewes: That is in the record, your Honor. We will withdraw the offer.

The Clerk: What are the numbers of those documents?

Mr. Drewes: The partnership return for 1945 is 13, 46 [1297] is 20, the affidavit is unmarked.

The Court: This marks the end of the evidence, I take it.

Mr. Drewes: The Government will rest, your Honor.

Mr. Hagerty: We have one more witness, your Honor, in rebuttal.

The Court: Will you call the witness as we go along?

Mr. Hagerty: But for the purpose of the record, on behalf of the defendant we would object to the admission into evidence of the affidavit executed by the defendant. I don't know what the number is—in connection with his father's estate.

The Court: The objection is overruled.

Mr. Hagerty: I don't know what the number of the Exhibit is.

The Court: Will you present your next witness, please?

Mr. Hagerty: Yes.

Mr. Lewis: Mr. Hellman.

ROLAND HELLMAN

recalled as a witness for the defendant, having been previously sworn, was examined and testified further as follows:

The Clerk: Please restate your name for the record.

A. Mr. Roland Hellman. [1298]

Direct Examination

By Mr. Lewis:

Q. Mr. Hellman, will you take schedule 4? Drawing particularly attention to the May 31 items, 1945, "purchased cashier's checks, Bank of America, 90-1, \$3,000"; another \$3,500 item, another \$3,500 item, and a \$5,000 item.

Have you those Exhibits? A. Yes.

Q. You heard Mr. Mytinger's testimony here?

A. Yes.

Q. As a public accountant and former revenue agent will you explain that transaction to the jury and also the transaction of the check, explain to us what effect from an accounting viewpoint matters testified to by Mr. Mytinger would have on schedule 4?

A. Well, in view of Mr. Carroll's testimony this morning and Mr. Mytinger was correct in as far as he went but he didn't cover the—he went—he covered this phase here and did not explain the result of the questions you asked him previously. In view of Mr. Carroll's testimony and his identification of

(Testimony of Roland Hellman.)

the mark on the checks, the four cashier's checks were purchased then with proceeds from the store check 2396 which is in evidence here, Exhibit A.Q. It was issued May 24, 1945, and cashed on June 1st, or exchanged on June 1st for these cashier's checks. However, this Exhibit, Government's [1299] Exhibit 58 showing a deposit of \$15,000 on the same date, June 1st, into Mr. Olender's personal commercial account, the purpose of which is clearly evident, to buy cashier's checks U. S. Exhibit 64 to purchase life insurance \$15,833.46, which was covered by the stipulation as far as the asset was concerned. That is related inasmuch as in working up this schedule we knew there were the two \$15,000 items, and schedule 4, to the extent that it detailed the four cashier's checks as having been purchased from the safe deposit funds, is incorrect but would also be incorrect then to the extent that it fails to take into consideration a transfer of \$15,000, presumably from cash in the safe deposit box, into the personal bank account from which he purchased the life insurance. So it is a wash transaction. One \$15,000 item comes out; the other \$15,000 item goes in. So it washes out entirely.

Mr. Lewis: That is all.

The Clerk: U. S. Exhibits 13, 20 and 25 heretofore marked for identification now in evidence.

(Thereupon the exhibits formerly marked U. S. Exhibits 13, 20 and 25 for identification were admitted in evidence and marked U. S. Exhibits 13, 20 and 25 respectively.)

(Testimony of Roland Hellman.)

Cross-Examination

By Mr. Shelton:

Q. Mr. Hellman, how many corrections have you made to schedule 4 since it was originally shown to [1300] the jury in its unrevised form?

A. Well, the very original schedule 4 was changed before we submitted it to the jury.

Q. I asked you how many times the figures on that original schedule 4 have been changed from the first moment that the jury saw it until now?

A. We haven't made any actual official changes on it yet. There are several changes which I explained previously probably would come about, because we are still groping till we find the right answer here.

Q. You are quibbling with me, Mr. Witness. But how many changes have you made or should have been made on that schedule?

A. Well, this one we are just talking about, would be a substitution. There would be no change in dollars. That is one. The Gray and Magnon items at the bottom, the Judge stated he will pass that item. There has been no definite ruling, whereas you said there was and he said he passed that item. It is not ruled on yet. So that is a possible change, so it is not changed yet.

The Court: What is that, \$1603?

A. The bottom item, your Honor, non-deductible expenditures admitted in evidence, I. Magnin for \$863.73, Gray Shop for \$1391.01. We started an

(Testimony of Roland Hellman.)

argument on that the other morning. You said
“We will pass that.” [1301]

The Court: What is the total?

A. \$2,254.74. We haven't had a final answer on that as to just which way to handle it. Those are the—that possible change in these items we were just discussing—those are the changes in the items that I have on schedule four before me. However, we had on this original schedule 4, in which we added the Fresno items and the—as additions to the safe deposit box, and these other three items on the Olender-Elkus bank account we added those.

Q. (By Mr. Shelton): Would that make a total of five, Mr. Hellman?

A. Well, the Olender-Elkus—really three changes—would be considered as one. They were all related to one transaction, which was overlooked—admittedly overlooked and we found the error and we willingly put it in. It was not trying to—it belonged in there and we put it in there. The same thing with the Fresno partnership, that information came out later. This schedule was prepared while the jury—while the trial was in process, you know, Mr. Shelton. We are trying to keep this thing as correct as we can.

Q. I will ask you if your recollection isn't wrong in one respect, that the Magnin and other expenditure at the bottom of this page were stricken out and then Mr. Lewis raised the question about those same items as expenditures [1302] on the expendi-

(Testimony of Roland Hellman.)

ture part of the schedule and it was then that the Court said he would pass it, is that correct?

A. That is possibly correct. I couldn't be certain without having reference to the transcript on it. But my point is this, Mr. Shelton, that if you are going to deny him——

Mr. Shelton: Your Honor, the remainder of this is argumentative. I think he has answered the question.

You may examine.

Mr. Lewis: No further questions.

Mr. Shelton: You may come down, Mr. Hellman.

(Witness excused.)

The Court: The evidence is closed?

Mr. Drewes: The Government rests.

Mr. Lewis: Yes, your Honor.

The Court: Ladies and gentlemen of the jury, the evidence in this case has now been closed. The Government has submitted its case on the evidence, and the defendant. They have called their witnesses and the witnesses have been subject to examination before you. The balance of the case entails the arguments of the counsel, the instructions of the court. We have covered a rather extensive field of evidentiary matter, including a great deal of arithmetical computation and statements and the like.

The relevancy and materiality of much of the matter will be particularly pointed out to you during the course [1303] of the argument. The arguments in a case like this are very helpful not only

to you but as well to the Court. It is impossible for the ordinary mind, and we all have ordinary minds, to comprehend the full impact of evidence until such time as it thoroughly unfolds and until such time as it has finally been sifted and resifted and much of what appeared to be, and still appears to be perhaps, of a general sense become more concrete as the arguments fit into the general mosaic, the pattern of the case.

Particularly in a case involving so-called net worth theory it has been my experience that until the last of the case is in, whether it is on the part of the defense or the prosecution, it is difficult to comprehend the full impact. I have had that experience in cases that took much longer than this, wherein the net worth theory was involved.

And I appreciate your patience involved. I noticed that during the course of the unfolding of the testimony you were extremely patient and considerate and painstaking in going over the Exhibits. I recognize that you ladies and gentlemen are not accountants, you aren't trained as accountants, perhaps only in the sense that you have the ordinary routine education that people get in accountancy in the grade schools as well as high school.

This case involves expert testimony. I will instruct you [1304] hereafter as to the experts, and I might add now somewhat parenthetically as to the expert testimony you are to view the experts the same as you would any other witness. They come before you and they are subject to examination and cross-examination. They are men skilled in their

art and in their science and in their profession and each expert unfolded to you the reasons underlying his conclusions. You are to examine the reasons underlying the conclusions each reaches in the light and in the searching light of the truth and the cross-examination conducted.

Counsel for the Government will have an opportunity to open the case.

I think it has reached the point now where it perhaps it would better serve if we started the arguments in the morning.

I have one or two items to discuss with counsel in your absence and we might be perhaps more receptive in the morning at 10 o'clock than we would be now to launch into extensive arguments.

I expect counsel on both sides to argue this case fully and, of course, fairly and completely to the end that every facet may be covered. I expect that there will be no limitation on the arguments. I haven't imposed any limitations in the past in this type of case and I am not going to do it in this. We have the next succeeding [1305] three days to complete the case and not having rushed it in its earlier stages, I am not going to undertake to rush it now. I perhaps labored under the impression, and I think it is a safe one, that the reception of a case of this character is like any other matter involving a subject that is not altogether familiar to us, we should take it more or less in stride. The human mind can only assimilate only so much during a given period of time and hence we have tried it as casually and I suppose as sincerely as we might be able to.

So, accordingly, at 10 o'clock in the morning, we will resume the case. At that time the Government will open its arguments. The defense will present its view or views and the Government has the right to close the arguments.

With respect to oral arguments, counsel on either side is entitled, and they are entitled to present to you the case from their most persuasive view and from their particular position that they occupy.

Naturally there is partisanship in the presentation of a case. Although it is often said that the Government presents a case to the end that all of the truth be exposed, I suppose in the human element there is bound to be a certain amount of partisanship one way or the other. Although I might say in this case it has been presented very thoroughly and ably and decently on the part of the [1306] defense as well as the prosecution. There hasn't been overriding or any tactics that might be regarded as subject to criticism.

Accordingly, ladies and gentlemen, I will recess the case until tomorrow at ten o'clock, with the same admonition to you not to discuss the case under any conditions or to form an opinion until the matter has been submitted to you.

(The following proceedings outside the presence of the jury):

The Court: On this last motion, I wish counsel would examine the record, and if I have failed to pass on any motion before me, I would like to have

it presented formally to me. On this last item reflected in Exhibit 4 that your account mentioned.

(Further discussion.)

The Court: We might begin at twenty minutes to ten, or a quarter to ten in the morning, and take these matters up.

Mr. Hagerty: We will have a few other motions, for the general purposes of the record, your Honor.

The Court: Are there any other matters now?

Mr. Drewes: No, your Honor.

Mr. Lewis: No, your Honor.

(Thereupon the adjournment was taken until ten o'clock a.m. Wednesday, October 8, [1307] 1952.)

October 8, 1952, at 10:00 A.M.

ARGUMENTS IN CLOSING

(The following proceedings were had outside the presence of the Jury):

Mr. Hagerty: Your Honor, we would like to make certain motions at this time and certain other requests in connection with instructions. At this time, if your Honor please, it is the considered opinion of my colleague and myself that a motion for a mistrial should be made on the grounds that the evidence in reference to the Laura Foote pension case is so highly prejudicial in a case such as this and itself being practically an inference on an

inference since it is hearsay pretty much as to this defendant, that to admit it would certainly deny this man the judgment of the unbiased minds of twelve jurors. Since the charge here fundamentally is one of tax evasion, and we find here what purports to be an attempt to screen an applicant or to shield them, or to subversively gain for them a pension which the general inference is the person was not entitled to, we do not see how this jury, if they would consider that evidence, could possibly be fair in their judgment of this defendant in this case. On that basis we make the motion for mistrial at this time.

In addition to that we make a motion for a mistrial [1308] because of the admission of the evidence relating to the testimony of Mr. Ringo and his communications had from the defendant on the basis that they are in violation of a privileged communication because of the relationship of attorney and client existing there.

It is admitted if Mr. Ringo were only an attorney and the defendant had come to consult with him in reference to his tax problems, that there would be no question—even in the Himmelfarb case, as stated in the opinion in the Himmelfarb case, that there would then exist the relationship of attorney and client, and the attorney would have no right to disclose the communications made to him. But here in addition to being an attorney he is also an accountant. He has had further training than that usually accorded an attorney, and he is in a better position to advise, and because of that situation, because of

the very things he did, because of the testimony he gave on the stand, he said the man consulted with me in reference to his tax problems, and because of the whole general circumstances, we feel that that evidence, communications between the defendant and Mr. Ringo, were privileged communications and should not have been admitted into evidence here, and, as a matter of fact, without that evidence the Government's case would fall flat. They would have nothing at all to go about. They couldn't start the initial net worth for the beginning of the period which they [1309] have based their whole case upon.

So on those two grounds we ask at this time for a mistrial.

Your Honor may want to consider that and I will go on from there. I will say, failing that, we make a motion to strike out that testimony and instruct the jury appropriately.

The Court: I will reserve my ruling until I hear from the Government on that, without interrupting you on it further.

Mr. Hagerty: I see. Then, of course, we have the additional motion that we ask that certain testimony in reference to the Goodman photostats that was given by Mr. Root—

The Court: Specifically what do you have in mind on that?

Mr. Hagerty: To strengthen the record on page 1257, beginning at line 7, wherein Mr. Shelton asked—

The Court: Will you read it? I haven't a copy

of the record. Will you read to me just precisely what it is?

Mr. Hagerty: I will read it. This one is not so particularly important but anyway I will read it:

“Q. (By Mr. Shelton): Mr. Root, I will ask you whether or not you ever showed the defendant, Milton Olender, these two photostats which have just been introduced in evidence?

“A. No, sir, I don’t believe so. I believe [1310] that Mr. Ringo inspected them.”

Of course, that is objectionable because it is an opinion in a situation of that sort.

“The Court: Where is the third invoice? There was another invoice, wasn’t there?”

The Court: The motion is denied in that respect.

Mr. Hagerty: Then Mr. Shelton says:

“Mr. Shelton: Your Honor, I do not recall that there was a third one related to those two. I may be in error.”

Then going on down to line 17:

“Q. (By Mr. Shelton): Will you state the dates of those two invoices, Mr. Root, and the amounts of the purchases as shown on the invoices?

“A. June 8th, 1944, \$9,600.

“Q. And the other one?

“A. The other one, June 14th, 1944, \$690.

“Q. Would you also read the price of the suits on first the June 8th invoice and then the June 14th invoice, Mr. Root?

“A. On the June 8th invoice there are 400 18-ounce suits at \$23 each.

“Q. On the 14th invoice?

“A. June 14th invoice there are 30 18-ounce suits at \$23 each.” [1311]

I believe that is all that occurred in front of the Jury. But I would ask that testimony of Mr. Root's to be stricken from the record in reference to those photostats. It is all hearsay.

The Court: You are particularly concerned about the price, aren't you?

Mr. Hagerty: Yes. The price and the amounts and the dates of delivery, you see. It gives——

The Court: The price more than the dates.

Mr. Shelton: Would your Honor hear from us on that?

Mr. Hagerty: I haven't finished my motions. Should I complete them?

The Court: I'd rather you complete them.

Mr. Hagerty: Then we would make for the purpose of the record, and also partially based upon the preliminary motions, a motion for judgment of acquittal for this defendant at this time. Failing that in the entirety, we would make at this time a motion for a judgment of acquittal on the count covering 1946 as there is no testimony or showing of unreported income in that year, with the exception of the transaction involving the sale of the Riverdale Ranch of which the defendant's share was \$497.64.

Mr. Shelton: That is tax, Mr. Hagerty.

Mr. Hagerty: Is your figure in agreement with ours?

Mr. Shelton: The \$2,016 figure is arrived at from the [1312] stipulation. That is the understated in-

come, of \$2,016, which ties in to the loss in the same year on the Wilson property, and the figure of \$497 and some cents is tax, was the third and final computation made by Mr. Hellman.

Mr. Lewis: Your Honor, that \$2,016, I think Mr. Shelton will agree, that there is only \$1,008 of it that is taxable.

Mr. Shelton: It is half non-taxable. I concede that.

Mr. Hagerty: So the tax amounts to, as I understand it, \$497.64, is that right?

Mr. Shelton: Yes.

Mr. Hagerty: Which is not a substantial amount. The income withheld is not a substantial amount to justify the use of the net worth theory in a case of this sort. So as to the year 1946 I would ask for a judgment of acquittal on behalf of this defendant on the grounds that there is no showing of a substantial evasion or understatement of income in the record and there is no showing that he was engaged in any other businesses or had any other sources of income other than the five enumerated even by Mr. Mytinger on the stand when he was recalled, I believe, yesterday.

Then after those motions, your Honor, I have two other requests in reference to instructions. I have talked with Mr. Drewes and he has agreed or stipulated with me that in his supplemental instruction 1, the last paragraph reads:

“It was therefore unlawful for the [1313] defendant to omit the Goodman suits from the inventory reported on his return if he did so knowingly.”

We have asked, and Mr. Drewes has agreed, that instead of the word "knowingly" being used, that the three words, "with criminal intent," be substituted therefor.

And then on our own behalf we would ask if your Honor would give as an instruction sub-section 6 and 7 of the California Code of Civil Procedure in Section 2061.

The Court: How does that read?

Mr. Hagerty: Which reads to this effect, sub-section 6 says:

"That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and the other to contradict, and, therefore,"

According to sub-section 7:

"If weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust."

The Court: You might present that in the form of an instruction.

Mr. Hagerty: Thank you, your Honor. And that is all my motions at this time. [1314]

The Court: You intend to argue from that certain aspects of the Goodman matter?

Mr. Hagerty: Yes, your Honor, and of the entire case.

The Court: I will consider it if presented in a written form.

Mr. Drewes: Will your Honor hear from the Government?

The Court: Yes.

Mr. Drewes: Now, taking the last matter up first in order, we will oppose the giving of that instruction on this ground, the absence of records in this case goes to the very heart of the case, it is that core of it. The instruction which Mr. Hagerty urges upon you, as I conceive, is properly given where there is some rational explanation or some grounds for believing that better evidence could not have been produced. That, of course, according to the Government's theory in this particular case, is simply not so. It is our thought that the records are not produced because they were intentionally either never made or destroyed. I think the giving of instructions that Mr. Hagerty urges upon you would under the peculiar circumstances of this case create a misapprehension, misunderstanding in the minds of the jurors.

Mr. Hagerty: My purpose in requesting the instruction, your Honor, is not in any way to cover our side but to attack the other.

Mr. Drewes: Well, it would work both [1315] ways.

Mr. Hagerty: Yes. You could use it against me, that is true. It is a two-way sword. But I feel that in this case a man whose name has run from the very start of the case should have been produced, Mr. Goodman, and I think I am entitled to argue that to the jury——

Mr. Drewes: We made our showing in that——

Mr. Hagerty: I think it is a very good showing.

Mr. Shelton: It is purely the conclusion of counsel.

Mr. Hagerty: That section of the California law would certainly cover that in argument. That is my feeling.

Mr. Drewes: I certainly do not think the Government should be held chargeable for failing to produce a witness who is apparently seriously ill, but in no circumstances——

Mr. Hagerty: Or a substitute for him?

Mr. Drewes: There isn't any substitute. Of course, that isn't in the record. If your Honor cares to hear further explanation——

Mr. Hagerty: This letter is not even in affidavit form.

Mr. Drewes: We had no control over that, as I explained that to the Court at that time.

Mr. Hagerty: The Government has offices all over the country. They could have procured depositions, they could have done lots of other things.

Mr. Drewes: The fact of the matter is Goodman has been ill. His records are—— [1316]

Mr. Hagerty: That is the reason I offered the instruction. I feel I should be able to argue the position.

Mr. Drewes: His records are in New York in the hands of an attorney, and the Government is at a loss to know who else there is to put the records in. Would your Honor care to hear the teletype that Mr. Shelton referred to?

The Court: Was Mr. Goodman ever under indictment?

Mr. Drewes: He was under investigation for a very long period of time.

Mr. Shelton: Not to my knowledge.

The Court: Well, the records in the hands of the attorney would have no particular sanctity there. They might be divulged or disclosed under process of court.

Mr. Drewes: My problem was how to identify them. They are there and are available but in the absence of Mr. Goodman I don't see how we could lay the foundation for introducing them, your Honor.

The Court: Isn't the Goodman firm still in existence?

Mr. Shelton: No, your Honor. He was operating under an individual basis, and at the end of the black market period he apparently got out. I would like to invite your Honor's attention——

The Court: When did the black market period end?

Mr. Shelton: In 1945, I think, your Honor. I would like to make a point here, that the defense has contended that [1317] some of these Goodman invoices might be fictitious. It wouldn't do any good to bring in a piece of paper to show it to be an invoice on the Goodman billhead, if in fact it was a fictitious invoice, and the Government would have a very sharp challenge from the defense to prove the genuineness of the invoice. The piece of paper wouldn't have been enough.

Mr. Hagerty: If your Honor please, without disclosing the full theory of my argument, that was just one attack we made upon the Government presentation. There are other gaps that had I been in charge of the prosecution I think—well, I don't mean to say—it is from the way we see it, they could have made a much stronger case if they had the evidence and they didn't have the evidence so they have used secondary evidence—if they had a case originally. And that's the only purpose of the request.

The Court: Let us pass that phase of the Goodman matter and the instruction proposed and take up the other items.

Mr. Drewes: With respect, your Honor, to privilege on the part of Ringo, that has been argued quite extensively.

The Court: That motion is denied.

Mr. Drewes: And the next point, your Honor, on the Foote transaction, I seriously question whether or not that evidence has the effect that Mr. Hagerty seems to attach to it. In any event, as I explained to the Court before, it [1318] was introduced out of the presence of the jury, was produced for two purposes, one, to rebut the testimony of Mr. Olender that \$5,000 gifts were made to him over a period of ten years and made to him and his wife jointly. The affidavit of Mrs. Foote which was executed—that is, the affidavit of Mrs. Olender, which was executed in 1939, flatly contradicts that testimony.

Secondly, the purpose of introducing the testi-

mony was to establish that the defendant never in fact received from Mrs. Foote \$2,500 which, according to his testimony, she had accumulated over a number of years. Now all of the records in the Fresno Department of County Welfare indicate they had no money, that \$152 is a joint account with Mrs. Olender was all she ever had.

Those were the purposes for which that evidence was introduced. I believe it is admitted for that purpose.

And we rest there.

The Court: I believe it is admissible for the purpose indicated.

Mr. Drewes: Mr. Shelton, will you discuss the matter of——

The Court: Accordingly, the motion in that respect is denied.

Now the other motion is a motion for judgment of acquittal. I will deny that. [1319]

Mr. Shelton: Including the individual request as to the year 1946?

The Court: Yes, that will be denied.

Mr. Shelton: Now, your Honor——

The Court: On this matter of the invoices?

Mr. Shelton: Yes. If your Honor please, on this matter of the Root testimony the Government relies here on the testimony at page 1244 where Mr. Lewis read from the——

The Court: What does that say?

Mr. Shelton: I am just going to read it, where Mr. Lewis read from the exhibit in evidence and himself put this in the record:

“I am offering the portion of the exhibit at the bottom of the page reading as follows:

“Goods received as follows:

“5/25/44, \$1,610.

“6/4/44, \$9,200.”

I may say parenthetically that should be “6/8,”—the “4” was a typographical error.

“6/14/44, \$690.

“Balance, \$9,050.

“Total, \$20,550.”

Now at that point Mr. Lewis himself brought the transaction into the record as to just what Mr. Root included in that material that he gave to Mr. Ringo, and Mr. Lewis having [1320] brought that in on behalf of the defense the Government is then entitled to show by oral testimony the source and in connection with that source the testimony by Mr. Root paraphrased what Mr. Lewis has said and then went further and gave the prices.

Now, if your Honor please, we feel that the only substantial question is about the prices, that Mr.—

The Court: I feel that that is a question, because the prices were gleaned from the invoices themselves.

Mr. Shelton: That’s right, but since the prices do tie into the totals, the Government strongly feels that Mr. Lewis having opened that matter up as to the invoices the Government was entitled to show from those invoices the prices appearing thereon, that it was a proper development of an issue raised by the defense.

Mr. Hagerty: But, if your Honor please, in a larger sense, this document was put into evidence with the power and permission for the jury to examine during their deliberations. Now in looking at the transaction, and realistically, we can't but escape the conclusion that the jury would read every bit of that document if they looked at it. The old rule of law is that if you admit a part of a letter the whole thing goes in, and I made that objection at the time that this document was admitted into evidence. It is our theory that the Government put into evidence originally the entire document. [1321] They said, "Oh, no, we want only that line in."

Mr. Lewis' transaction was merely to show that that information didn't come from Mr. Ringo, that it came from Mr. Root.

Mr. Shelton: But he showed the substance of the amounts, your Honor. He showed the dates, he showed the total purchase amounts on each date as shown on the invoice, and having shown the totals shown by the invoices it is then meet and proper that the Government should be allowed to show the items making up those totals.

Now so far as the invoices themselves are concerned, they have now been stricken from the evidence and the Government agrees that ruling was proper so far as allowing the witness to testify the basis on which he furnished the information, we believe that was quite correct.

The Court: The same result would be derived at as a result of arithmetical computation, if you

divided the number of suits into the totals. Is that correct?

Mr. Shelton: That's right.

The Court: As to price.

Mr. Shelton: I believe that is right. With the one possible error.

The Court: There was an error in the \$9,000 item, I think, which was corrected.

Mr. Shelton: Yes, your Honor. [1322]

The Court: I think as the evidence unfolded, and in view of Mr. Lewis' examination on that point, that the motion to strike that testimony should be denied. Accordingly I will deny it.

The matter therefore rests upon the instruction. I will pass upon your instruction—I shall read it hereafter, your proposed instruction. My present inclination is to give that instruction based upon the Code Section.

Mr. Hagerty: Thank you, your Honor. We will have it prepared, typed out then, those two sections.

The Court: I am not committed to that, but that is my present inclination.

Mr. Hagerty: I think that is fundamental logic.

Mr. Lewis: Your Honor, we have one more matter, and that concerns the Magnin, Gray Shop expenditures which——

The Court: I haven't ruled on that matter of the Magnin, Gray Shop—is that what you are coming to?

Mr. Hagerty: Yes.

Mr. Lewis: Yes.

The Court: Go ahead.

Mr. Lewis: As you remember, that was the \$2,000 some odd item, whether or not the money had come from the safe deposit box or whether it was a checking item, no one testified to it. They couldn't determine, that there is any evidence to justify removal of that from Schedule 4. The same [1323] evidence would necessarily require that these items be eliminated from the nondeductible expenditures. In other words, the Government is attempting to have its cake and eat it, too. They are claimed to be check expenditures so as not to belong in Schedule 4; then they are not admissible as additional nondeductible expenditures on Schedule 3 (a) or U. S. Exhibit 51. If, however, they are cash expenditures, the cash must come from the safe deposit box, since, according to Mr. Olender's testimony, any cash expenditure, if not traceable to a withdrawal from the bank account, emanated from the safe deposit box, which was his sole cash depository.

Mr. Shelton: If your Honor please, the testimony of Mr. Olender was clear-cut, that he did not know where the money came from to pay the Gray and I. Magnin accounts. The defense, including those items on Schedule 4, is based on the contention that there is evidence that they came out of the box. Now the box was admittedly under the control of the defendant and if he didn't know how the payments were made to the Gray Shop and I. Magnin, then the defense cannot say that that testimony supports the contention that it came from the box.

The Court: Well, Schedule 4 in major particulars is a document based upon reconstruction, recollection and correlation of events. Some of the items found on Schedule 4 are admittedly based upon inferences to be drawn from certain [1324] admitted facts, and I think it is a matter of argument on Exhibit 4 as to its worth. I believe that there was sufficient evidence to support the introduction, although perhaps slim in part, and we come back to my original premise and my original thinking in this case, the beginning and the ending of this case is the credibility of the defendant, and Schedule 4 is another criterion of credibility, and I think you can apply the test thereto in the light of the general picture as it is unfolded in this case. I believe in the light of my general reasoning that therefore these two items should remain as indicated.

Mr. Drewes: May I state one thing in that connection?

The Court: Yes. Otherwise I am going to emasculate my own ruling then and make myself perhaps illogical as to one phase of the document because although the defendant did not recollect the precise source of the funds, he did state that the funds came from certain quarters, and by process of elimination we eliminate, ergo, it came from the box. Now that may be fallacious from your viewpoint. But that is a matter of argument.

Mr. Drewes: If I may just say this, that the Magnin and Gray Shop matters differ from the others in just this particularity. Of course, we have

all had an opportunity to review the record in the last couple of days, and in connection with the Magnin and Gray Shop transactions the [1325] defendant testified categorically that he didn't even know that the accounts existed. Now if he didn't know they existed, how did he take the money out of the box and go and pay them? That is the only difference between those two items——

The Court: Argue that to the jury.

Mr. Drewes: All right. If you don't take care of it, I will certainly do my best.

The Court: I pass upon the law. Call in the jury. It is a very pretty argument before a jury.

(The following proceedings were had within the presence of the jury:)

The Court: Is it stipulated all the jurors are present?

Mr. Hagerty: So stipulated.

Mr. Drewes: So stipulated.

Mr. Lewis: Yes.

The Court: Ladies and gentlemen, I might say as a preface to the arguments that these recesses that we have had from time to time during the trial are taken in aid and in order to facilitate the furtherance of the trial and the administration of justice. There are two particular and distinct phases to the trial of a case and, as I attempted to disclose to you at the very outset, I occupy a role that is peculiarly and singularly my own, and that is my function to administer the law of this case. Now in administering the legal aspects of a case

there arises certain channels of [1326] activity. During the course of the trial, as you observed, the Court was required to pass upon the admissibility of evidence, and there has grown up in the law traditionally certain rules, certain safeguards. In that connection I attempted to rule in the light of the law, as I know it and as I read it, and in the light of our trial experience, and in view of the traditions of these Courts and the common law practice, and our Rules of Federal Procedure, all of which have taken generations to build. You are not to surmise nor conjecture as to the reasons underlying my rulings. You may disagree with me. You may say if I had occasion, I would rule differently. You indicated to me when you were accepted as jurors you would agree with my rulings, and accordingly that is your bounden duty. If I have stricken from the record certain testimony, you are bound by that no matter what your personal view may be, and in like manner I am bound by your province—that is, passing upon the facts.

You come now to the phase of the case wherein the impact of it is going to be felt more keenly by you, and very shortly, within the next day or so, we will have to part company. You will go your way into the jury room and I will have to finish my duties insofar as finally instructing you as to the law.

In that connection I will do it as carefully and as [1327] painstakingly as I may be able. I give you these preliminary thoughts in order to make you a little more receptive to the argument.

The arguments are not given to you in any oratorical sense, nor are they given to you to waste your time. As I indicated to you, counsel on either side have the bounden duty to represent to you from their viewpoint and as strongly as they please from their viewpoint their theory of this case.

The defendant, as I told you at the threshold, entered a plea of not guilty. He therefore put in issue all of the material allegations of the complaint, and there are three counts in the complaint, and he said to the Government: You must prove those charges to a moral certainty and beyond reasonable doubt.

The Government says it has. The Government has completed its evidence.

Now you will hear from counsel for the Government in his opening statement. He of course has the right to close. The defendant counsel will present their theory to you.

You may now proceed, counsel.

Mr. Drewes: First, your Honor, there was heretofore offered into evidence the affidavit of Milton Olender to the Bureau of Internal Revenue in connection with his father's estate. There was some difficulty to locate it. For the [1328] purpose of the record, may I renew the offer?

Mr. Hagerty: Of course, the defendant, your Honor, will make the objection on the record because the case in chief has been closed.

Mr. Drewes: That was offered and admitted in evidence but we could not find it.

The Court: You since found this affidavit?

Mr. Drewes: The Clerk had it. He put it in a separate envelope.

The Court: You found it, Mr. Clerk? Will you indicate for the record what happened, please?

The Clerk: Yesterday counsel for the Government offered several items that had been marked for identification and included this which had no mark on it whatsoever. It had simply been lodged. And after searching through the items that we had here I found it and it is being reoffered this morning.

The Court: Well, in fact this was admitted in evidence during the trial.

The Clerk: No, your Honor, it was simply lodged with the Clerk and has never been marked for identification or any other mark except that it was lodged with the Clerk.

Mr. Hagerty: We had discussed it before, your Honor, and I had objected to it then, although we have all seen it and certain portions of it have been read to the jury. [1329]

The Court: Well, this has been referred to during the trial?

Mr. Drewes: Oh, yes.

Mr. Hagerty: Yes. Just for the purpose of the record, to be consistent with our former position, we are making our objection at this time.

The Court: You were instructed to have the jurat affixed.

Mr. Drewes: Yes. That is why it was lodged with the Clerk.

The Court: It may be marked. Did you ever get the jurat?

Mr. Drewes: No, we did not, your Honor.

The Court: It may be marked. To that extent the evidence is reopened for the purpose of marking that in evidence.

The Clerk: U. S. Exhibit No. 67 in evidence.

(Thereupon affidavit of Milton Olender, to Bureau of Internal Revenue, was received in evidence and marked U. S. Exhibit No. 67 in evidence.)

Opening Argument on Behalf of the Government

Mr. Drewes: May it please the Court, ladies and gentlemen of the jury, I think I will dispense with this (referring to microphone), and if you have any difficulty in hearing me, will you please so indicate. I will try to do better. If I then don't succeed, then I will resort to the [1330] microphone.

As his Honor has indicated to you, it is now the time for the Government to present to you its views of this case.

It has been a long case. It has been certainly an involved case. I'm afraid that it has not been a very interesting case. That may be all to the good. Criminal cases should be considered by jurors dispassionately by the application of logic and reasoning. I think that is particularly true of this case, to the extent that it has not been an exciting case, possibly to that extent it will be decided more dispassionately and on a more rational basis than possibly some of our cases are decided.

The Government is convinced that after you have considered carefully all of the aspects of this case you will conclude that approximately 90 per cent of the defense is sheer fabrication, it will not stand up under logical analysis, it will not stand up under reasoning.

Now as you know the defendant has been charged in four counts with wilfully attempting to evade his income tax and that of his wife for the years 1945 and 1946. In order to prove its case, as the Court will instruct you, the Government must establish first that there was a substantial unreported income upon which tax was due, and, secondly, that the defendant wilfully intended to evade his taxes and to defeat the revenues of the United States. [1331]

In this particular case the two are peculiarly interwoven, although in theory the Government must establish both elements to ask for a conviction. In this particular case the record is such, I believe, that it comes down to this, if you believe the defendant's explanation for these various complicated transactions, then, of course, he had no intent, and by his calculations there is no substantial understatement of income. I believe there is an overpayment contended for by him in 1946. But if you disbelieve his testimony, as I believe you will, not only is there a very material understatement of taxable income but it necessarily follows that he intended to defraud the United States of its taxes because the entire scheme, if disbelieved, carries with it the inescapable conclusion that he intended

to achieve that particular result, the avoidance of taxes.

Now, we are using the net worth method of measuring the income of the defendant, and both of the experts have explained to you just what is meant by net worth. I don't think, however, that it would do any harm to explain it to you just briefly again.

Ordinarily, of course, when anyone, an accountant, business man, or a revenue agent, wishes to find out what income an individual or a business man has and what deductions he may claim, you ordinarily just go to his books of account, turn to the proper pages and there you are. It is all [1332] set forth. It is a very simple matter. But when books of account are not kept at all or are incomplete and do not reflect the income of the individual, there is no other way to measure it, his income. There is just nothing to which you can go. There is no record. You don't know what his income was. You don't know what his disbursements were. And so it is hopeless. So, of course, the alternative way of doing it, the only way of doing it, is to determine as of one period what the individual's assets were, what he owned, find out then at a later period, for example, a corresponding date—Let's take, for example, the end of the year, as we have in this case, of the next year, find out what his assets are on that date and subtract the difference. Now, if there is a larger figure, if he owns a lot more property at the end of the period than he did at the beginning, he had to have income with which to acquire that property. That, of course, is self-

evident. But then, of course, from that point on it gets a little more complicated because there are a number of adjustments that have to be made. That is just the figure in the raw. If you start out with assets having an aggregate value of \$100,000 as of the last day of one year and then determine that as of the last day of the next year he has \$200,000, obviously he had income of \$100,000 during the period. But that is, as I say, a figure in the raw because you have to make deductions, and I am not going through all of the possible [1333] adjustments that would be necessary. That would serve no particular useful purpose. But just for the purposes of illustration and to sketch out for you in broad strokes the approach, you would deduct of course any gifts that he got because that would add to his income during the period but it is not taxable. That is not his income. So you take those out. And if he made any capital gains, you would adjust for that portion which is not taxable. As you know, we have been through that in the Riverdale property at great length. That is handled in another way. So if any of that \$100,000 that he enjoyed during the year is to be attributed to capital gains, you have to adjust as to that. But now you also have to add to that \$100,000 whatever it cost him to live, he and his family, grocery bills and light bills and heat bills and gas bills and laundry bills and all expenses of that kind, you can't deduct from your income tax calculations—unfortunately, but you can't.

Now to the extent that you can establish that the taxpayer had living costs which were nondeductible,

you have to add to that—add that to the \$100,000 because he certainly, if he bought groceries, if he lived at all that year he bought groceries, and if he bought groceries you have to add them to the \$100,000 because they are not deductible.

Now, of course, similarly with taxes, Federal taxes, you have to add to the \$100,000 any taxes that he paid. If [1334] he paid the taxes the year he had the money—and you can't deduct from your Federal income tax calculations the Federal taxes that you pay, and so you have to add that.

Now that is the system that we have used here. Now the reason we have used it I think is quite apparent to all of you. The notorious Goodman transaction as established in the record is nowhere on the books of account of the taxpayer. He received \$7,000 from Mr. Saraga. More about that later. But where did it go? It went into his personal account, not into his business account.

He received \$5,000 from Mr. Lerman—and more about that, too, later. But that went into his capital account. Not into sales.

And then of course, Schedule 4, all of these withdrawals from the vault, all frankly admitted by Mr. Hellman on the assumption—When I say “all”—let me qualify that, lest I depart from the record. I am referring to those very many transfers to personal account and transfers to Olender-Elkus account, transfers to McGrete—there are a very great many of them. And for the three years in question the total of those withdrawals exceed \$92,000, and Mr. Hellman frankly stated on the

witness stand that they were included on the assumption that they could not have come from any other place. But that doesn't tell us where they came from, and there were no records, so obviously in this particular [1335] case we have to resort to the net worth method of determining income as the only possible way of finding out what this man had by way of income in the two years. There just wasn't any other way.

His own accountant, Mr. Ringo, testified that he didn't make an audit, and the reason he didn't make an audit was because it was impossible to verify the transaction. Let me just call your attention to that testimony. It appears at page 68 of the record. Question propounded to Mr. Ringo:

“Q. * * * I take it you did not make an audit of his books and records?”

“A. No, I did not make an audit of the books and records.

“Q. Will you explain why you did not?”

“A. Well, in a great many of these transactions, they were purely cash transactions by use of currency, and so forth, and it would be impossible to really verify figures.”

So, as I say, the use of the net worth method of calculating the taxpayer's income was the only possible way of making or of measuring the income that he enjoyed for those two years.

Now let me point this out to you, too, and I believe it will clarify it for you, if there is any doubt in your minds, what a lot of the shouting has been about. Suppose that we have an ending net

worth of \$200,000 and a beginning net worth [1336] of \$100,000. Now the increase in net worth for the period would of course be \$100,000. This is the beginning and this is the ending, and I have put them in the reverse order for the purposes of making the simple mathematical subtraction (placing figures on blackboard). As I say, the raw net worth is \$100,000. Now it is to the advantage of the defendant to increase this beginning net worth as much as he can. If he can increase this beginning net worth to \$150,000, then what is the measurement of his income for the period? It is reduced to \$50,000. And it is also, secondly, to the interest of the taxpayer to decrease the ending figure. If he succeeds in decreasing the \$200,000 to \$100,000, he has likewise succeeded in reducing his measured income for the period. Again the taxpayer seeks to increase his beginning net worth as much as possible—that is to his best interests to do so, and it is also, and for exactly the same reason to his best interests, to make the ending net worth as low as possible, for the same reason. Now that of course is what the taxpayer has done here.

Now the defendant's Exhibit AK, or what is probably better known to you as their Schedules 3, 3-A and 4, the taxpayer, as you will see from Schedule 3, which I believe you have—Don't you have that?

(A juror: No.)

(Schedules passed to the jury.) [1337]

Mr. Drewes: You will note on their Schedule 3,

halfway down the page, or not quite—"Net worth per Government computation." Now those are taken from the Government's figures, which you also have. However, of course, in connection with the Government's figures you have the computation of taxable income due—taxable income unreported and the tax thereon, which isn't shown on defendant's Schedule 3, because they go on and make their own.

But to go back. Schedule 3 starts with the Government's computation of net worth. Now, as I pointed out to you, the defendant seeks to increase that beginning net worth. The more he can increase that, the less will be his income for that period, the period 1945—we start with 1944 and end with 1945. Now, the bigger the base period, the more he can increase the beginning net worth, holding the ending net worth constant, the lower will be his measured raw income. Now he seeks to do that first, you will note, by increasing cash in the safe deposit box. We credit him with \$50,000. He contends that he had over \$72,000, and so he would increase the net worth right there by \$22,000.

Next he calls attention to an outstanding check which should have been compensated for and asks that another thousand be added to the beginning net worth.

Then he comes to the famous Goodman transaction and he says: We had all Goodman suits and they weren't in inventory [1338] so we have to add those. When he says he had them, he had them as

of December 31, 1944, so we have to add that large figure of \$20,000.

And then he says: Our accounts payable were overstated. In other words, we had our books reflecting that we owed more money than we really did, because we had already paid those bills and neglected to credit ourselves with them in our books. So we are going to add that \$7,000 back and then correspondingly increase our beginning net worth.

Now in 1945, you will note, he picks up the Saraga check.

Let me go back first. There is another item here. He says that he has \$30,000 on hand as of December 31, 1945, and whereas we only credit him with \$7200, and he adds that to his beginning net worth—pardon me—to his net worth for the year 1945, and he adds the Saraga check to his 1945 net worth.

Now he deducts then from both, because it is to his best interests to cut down as far as possible his ending net worth as of 1945 and 1946—he takes from both \$20,000 because those, of course, you recall, he says are bonds which in fact belong to his mother and not to him.

Then finally, if you turn to Schedule 3-A in the year 1945 he would then have us deduct \$6,000. Why? Well, that is one of the calculations or computations which, if you [1339] believe, must be made for the reason that gifts are nontaxable income, and if he received that money as gifts it would reduce his net worth for the year 1945 by that much. Those gifts came from Mrs. Olender and also other funds

not by way of gifts, however, from Mrs. Widrin and Mrs. Foote. Now more about those later.

I want to take up each one of those calculations in turn.

The Court: Counsel, this might be a convenient time to take the morning recess.

Mr. Drewes: Yes.

The Court: Ladies and gentlemen, we will take the morning recess, and the same admonition during the course of argument as during the course of trial, not to discuss the case under any circumstances, not to form an opinion until the matter is submitted.

(Short recess.)

Mr. Drewes: Now it is my purpose to discuss with you each one of the adjustments which the defendant contends should be made in the Government's computations of net worth for 1944, 1945 and 1946—not necessarily in the order as they appear on the Schedule 3 which you have. For example, the \$1,000 item appears to have been an outstanding check which was not thought of by the accountants during the course of their examination, and therefore the cash figures which appear [1340] earlier in the schedule are understated. The Government contends that figure, \$1,000, should be added to the beginning net worth.

Now with respect to the \$7,000 overstatement of accounts payable—that, you understand, the defendant contends was an error on his books, that he had in fact, according to his views of the matter,

already paid those obligations but he had not so reflected on his books, that his books didn't show it as of the end of 1944, therefore, according to the defendant, he had overstated his liabilities and, consequently he had understated his net worth as of that period. Now that particular item, you remember, consists of purchases from two sources, from Barney in the approximate amount of \$2,000, and from Money Back Smith in the approximate amount of \$5,000. Now with respect to the purchases from Barney, we concede that. The defense produced in Court defendant's canceled checks which do establish that he had in fact paid those bills, although he had not recorded the payments in his books. In other words, he still carried them as of the end of the year as outstanding debts of his. Now, the other \$5,000 is the Money Back Smith transaction. We do not agree. You will recall, I am sure, that the books reflect—the taxpayer's books of the Army and Navy Store, reflect the entries of accounts payable to Money Back Smith as of the last day of the year, December 31, 1944, whereas he testified that those purchases [1341] were all made at the beginning of the year and the failure to pick up those purchases in the books for ten or eleven months is unexplained. You remember Mrs. Manger testified that she didn't know. She was the bookkeeper. She couldn't recall why those entries should have been made at the time, ten months or eleven months, as the case may be, after the purchases. And I asked Mr. Hellman if he could explain, and he didn't know. Further, you will recall, Mr. Lorenzen of

Money Back Smith testified that he had made sales to Mr. Olender and he had received in payment therefor sometimes cash, sometimes checks, and Mr. Olender himself, in testifying on that point, said that he had paid part in cash and part in checks. Where are the checks? They haven't been produced. So we are not willing to concede that the Money Back Smith transactions were in fact as contended for by the defense.

Whatever view of the matter you may take, ladies and gentlemen, let me call your attention to the year 1945. The Government contends that the understated—unreported net income is just a few dollars less than \$47,000. Now there is plenty of room there to absorb the \$1,000 error and the Barney transaction.

With respect to the \$7700 item appearing in Schedule 3 as an addition to net worth in 1945, that appears to be correct. We don't concede for a moment that the Saraga transaction had anything to do with the Goodman transaction, as the [1342] defense sought to have you believe. But whatever the explanation may be, it does seem apparent that as of the end of 1945 Mr. Saraga did have in his possession this money, for whatever purpose however it might have, he did have it and it belonged to Mr. Olender. Therefore, it is properly added to his net worth as of that year.

Of course, by increasing the net worth by that amount in 1945, that helps the Government.

Now I want to take up with you the subject of cash. The two most important adjustments which

the defense seeks to make in this case with respect to the beginning point are the adjustment to cash, increase it by \$22,000, and the Goodman suits—also over \$20,000.

I want to turn my attention to those particular points.

First, with respect to the cash. The United States contends that as of the beginning of—that is, at the end of 1944, which is the starting point, the base point, that the defendant had \$50,000. The defendant contends that he had \$72,000 plus, and therefore would increase his beginning net worth by \$22,000, which is to his advantage because that will cut down, if he succeeds, his increase in 1946. Now the Government agrees that the defendant had over \$70,000 in May of 1944 in the safe deposit box. The defendant's Exhibit D, you recall, is an affidavit executed by Monroe Friedman. Mr. Friedman, now Judge Friedman, states that at that time the [1343] defendant had money in the box. That is certainly good enough for us. However, the affidavit recites that, "On April 22, 1944, the affiant (Monroe Friedman) went to the box with Mr. Olander where the money was found, and that the had over \$70,000."

Now, that is April 22, 1944. That is over seven months before the starting point in this case, and although we concede that he had the \$70,000 in April of 1944, we do not concede that he had it on December 31, 1944. We do not concede that it was Mr. Olander's money. We don't know whose money it was, and we most certainly do not concede that

it came from his father's estate, as he would have you believe. To the contrary, the Government's position is that the entire record in the case negatives the contention that the money came from his father. The defendant testified that his sister, who is an attorney-at-law and was attorney for his father's estate, did not know anything about the \$5,000 of annual gifts. Highly unlikely. The estate tax return which was filed with the United States Government in connection with his father's estate specifically states that no gifts of any kind were made by the decedent prior to his death. The defendant, Mr. Olender, was the accountant for the estate. You recall his testimony. He would have you believe that the only work he did in connection with his father's estate had to do with various conferences concerning the evaluation of real property which [1344] is listed in the estate tax return, Government Exhibit No. 46, and that another accountant prepared it, a man by the name of Reed. The estate tax returns, showing under the section of disbursements, show that Mr. Reed got a hundred dollars for his services. Mr. Olender got \$1900 for his. Let me read this to you again:

“Schedule G, Section 3, did the decedent at any time make a transfer of an amount of \$5,000 or more without an adequate and full consideration in money or money's worth?”

That is legal language meaning: Did he make a gift—and the answer, “No.” No gifts. And the defendant has testified that to this date no amended return has ever been filed with the United States

Government correcting that document if it is in error.

The defendant testified finally that the gifts were made to himself and to his wife. Let me read to you:

“Q. (By Mr. Hagerty): Now you have testified that during the period of time from approximately 1930 to 1939 your father made gifts to you of approximately \$5,000 each year in cash and placed it in the vault in the Olender Building in Fresno?

“A. Yes.

“Q. Was that gift for you alone?

“A. No, it wasn't. It was for me and my [1345] wife.”

But Mrs. Olender, in connection with her mother's eligibility to receive old-age benefits in the State of California, executed a sworn statement on the 23rd day of May in 1939 in which she set forth a description of what she owned, of what her assets were. Let me read to you from this affidavit:

“Do you or your spouse own your own home?

“No.

“Have you any cash on hand?

“No.

“Have you deposits in the banks?

“No.

“Have you deposits with building and loan associations?

“No.

“Have you postal savings?

“No.

“Do you keep funds in a safe deposit box?”

“No.

“Do you own negotiable securities?”

“No.

“What are your spouse’s earnings?”

“\$150.

“Subscribed and sworn before a Notary Public.”

That was in 1939.

According to the defendant’s testimony, he and his wife [1346] had in the vault in Fresno by way of gift from the father either forty or fifty thousand dollars, depending upon whether the 1939 gift had been made or hadn’t been made at the time that affidavit was executed. Mrs. Olender in a sworn statement under oath in May of 1939 says she has practically nothing.

He had the money in the box but it didn’t come from his father’s estate. That must be clear. Where did it come from? Only Mr. Olender knows. But we think we know. We think that money was accumulated from unreported transactions in cash similar to the Goodman transactions in prior years. That’s where we think it came from.

Now the Government has given him credit in its beginning net worth of \$50,000. We base that on information which the taxpayer himself gave to his own accountant, Ringo.

Now, ladies and gentlemen, I want to give you the Government’s Exhibit 26. This is a photostatic copy, you will recall, of comparative net worth which was made by Mr. Ringo in his own handwrit-

ing and is based upon information given him by the taxpayer. That is Exhibit No. 26.

Exhibit No. 45 is likewise a photostatic copy of a series of questions and answers propounded to Mr. Olender by Mr. Ringo in the course of his attempt to reconstruct Mr. Olender's net worth, as the accountant for Mr. Olender.

And under No. 19 you will see on the right hand side here [1347] a number of figures and these figures are in the handwriting of Mr. Ringo. But the information likewise came from the taxpayer.

I am going to ask you to take the time to look at each one of these documents.

Exhibit 26, cash in vault, is the particular item I wish to have you—I will ask you to examine (handing to jury).

The Court: Does that document bear a date, counsel?

Mr. Drewes: I don't recall. Which document, your Honor? Number 26 is the comparative net worth.

The Court: The memorandum.

Mr. Drewes: Number 26 is simply entitled, "M. Olender comparative balance sheet 1941-1946."

There appears to be no date on it.

The Court: And the other one?

Mr. Drewes: No. 45 appears to have no date at all.

The Court: What, if any, date is reflected in the record concerning those exhibits as to the date or approximate date of their preparation and submission?

Mr. Drewes: It is my recollection, your Honor, that——

The Court: I can't recall presently. That is the reason I asked.

Mr. Drewes: It is my recollection that Mr. Ringo prepared those in 1948 after his employment by Mr. Olender. That [1348] is my best recollection.

The Court: In reconstructing the situation?

Mr. Shelton: As I recall, Mr. Ringo testified that he did that during the course of his work. Whether in the year 1948, I am not sure, your Honor.

Mr. Drewes: You have all had the opportunity to examine these two documents.

If your Honor please, I see it is almost the noon recess. We had an interruption. There is little point in starting.

The Court: We will resume at two o'clock, ladies and gentlemen, the same admonition, not to discuss the case or to form an opinion.

(Thereupon an adjournment was taken until two o'clock p.m. this date.) [1349]

Wednesday, October 8, 1952, 2:00 P.M.

Mr. Drewes: Now, ladies and gentlemen, you have had an opportunity to examine Government Exhibit No. 26, the comparative balance sheets prepared by Mr. Ringo for the taxpayer, and you have had a chance to examine also Exhibit No. 45.

It is upon that evidence that the Government asserts that the defendant had \$50,000 in cash in his vault on December 31, 1944. You recall that Mr. Ringo testified that that information came from

the taxpayer. You will recall earlier in my argument to you I pointed out that it is to his advantage, the advantage of the taxpayer, to make his beginning net worth as large as possible. Therefore I submit to you that there is every reason to believe the figures which appear in those documents, which you have just seen, represent the best possible showing that the taxpayer felt he could make. Mr. Ringo, you will recall, is a certified public accountant, and you can be very sure that he appreciated the fact that the larger the figure, the more advantage it was to his client.

I also want to call your attention to the fact, as you have seen, there are a number of items included in this Exhibit 45—with the exception of minor adjustments for accrued interest and matters of that kind, every one of those [1350] items is included in the stipulation, which is the United States Exhibit No. 15. Of all the information pertaining to the defendant's assets, which were included by Mr. Ringo in the comparative net worth which you examined, that item and that item alone is the only one that is subject to attack at this trial. If all of those other items are correct and have been adopted for the purposes of this trial, is it not reasonable to assume that the cash involved—the cash in the safe deposit vault, is not also correct—again when it was to the best interests of the taxpayer to make just as big a figure as he possibly could? Now the taxpayer urges you to find that as of December 31, 1944, he had cash in the amount of a little over \$72,000, or \$22,000 more than we have given him

credit for. That is the first serious attack on the net worth statement as computed by the Government.

And upon what does he base that attack, ladies and gentlemen? He bases that on Schedule 4, which you have before you. The taxpayer testified that any assets which he enjoyed during the years in question otherwise unexplained must have come out of the vault. Mr. Hellman, who testified for him, stated with perfect candor that the withdrawals and some of the additions which were included in Schedule 4 were included on the assumption that if they couldn't be shown to have come from any other source or have originated in any other source, they either originated or came from the [1351] box. He also pointed out and agreed with me, when I asked him if there were not other possible sources from which unexplained receipts might not have come, and he admitted that there were: Interest on stocks and bonds might account for some of the receipts of the taxpayer, sales of other assets, about which we know nothing, might explain where the money came from. Re-deposits of cash which he had withdrawn from banks on earlier dates and then re-deposited at the time shown on Schedule 4 might well be the source of otherwise unidentified cash; unreported withdrawals from his business might be another such source. And in this connection let me remind you that the United States Exhibit, which is the stipulation, shows as the very first item, "Army & Navy Store, cash in store registers, 1944, \$2500," and in the following years 1945 and 1946,

\$1,000. So \$1500 was drawn out of the store and to this very moment nobody knows what happened to it. I asked Mr. Hellman if he was able to find out or ascertain from any other records of the taxpayer what happened to that \$1500, and you will remember he stated that he had not found it. We still don't know what happened to that money. And then, of course, transactions similar to the Goodman transaction, merchandise purchased in cash, sold, and the proceeds re-deposited, might also account for otherwise unexplained receipts.

As I stated to you a little earlier, under withdrawals on [1352] Schedule 4, transfers to personal bank account, transfers to Olender-Elkus account, transfers to the McGrete account, they aggregate over \$92,000, and there is no record by which it can be determined where that money came from. They are included on Schedule 4 predicated upon the testimony of Mr. Olender, and upon his testimony alone, that because he had only four or five designated sources of income, if he received \$92,000 in those three years it must have come from the vault. Now that is a big assumption and there at least five other assumptions which are equally applicable.

Consider Schedule 4. After that was first prepared it was necessary to revise it, and at that time there were added to the Schedule 4 the two items shown as January, 1945 and '46, "Receipt from partnership." There were added also two transfers to the Olender-Elkus bank accounts shown as withdrawals. The witness Hellman testified the May 31, 1945, four items, cashier's checks, purchased with

cash from the vault. The closing minutes of testimony yesterday established that those checks—pardon me,—that those cashier checks were purchased with defendant's Exhibit AQ, which is a check drawn on the Army & Navy Store. To be sure there was another deposit of cash unexplained on the same date in his personal account. But to the extent that Schedule 4 shows the purchase of four cashier's checks with cash out of the vault, it is wrong, because they were purchased [1353] with a check drawn on the Army & Navy Store.

You examined Schedule 26 just before the noon recess. I doubt if you saw this item, however, because I didn't call it to your attention. "U. S. Government bonds 1944." There is a figure shown of \$24,000, and down below it says, "Check 1991 \$5,000, vault \$9,000." "Vault, 9000." Look at Schedule 4. 1944, "Withdrawal purchase U. S. Treasury bonds, \$8,000." And the balance as of December 31, 1946, is \$385.02. If you increase the withdrawal from \$8,000 to \$9,000, you get a negative balance as of December 31, 1946. What sense does that make? How do you have negative cash? It makes no sense at all.

The two items, I. Magnin & Company and Gray Shop, which appear as the last two items on Schedule 4, they are, of course, included as withdrawals from the vault. Let me read to you the testimony of Mr. Olender in connection with the Magnin account. Mr. Hagerty asked Mr. Olender about the Magnin account and he asked some questions about

his daughter and then he said, speaking of the daughter:

“Well, did she make any other purchases that are represented in that account?”

“A. No.

“Q. The Magnin account?”

“A. I don’t know. But I believe she must [1354] have.

“Q. At any rate, did you pay for anything that she was charged with?”

“A. I didn’t even know those charge accounts existed.”

Now, ladies and gentlemen, if he didn’t know the accounts existed, how did he take the money out of his cash deposit—out of his safe deposit box and pay the bills? Schedule 4 purports to state that Mr. Olender withdrew the sums there shown from the safe deposit box and paid the Magnin bills. And in accordance with testimony you just heard he didn’t even know they existed.

Now don’t misunderstand me. I am not quibbling here. I am not just trying to pick this Schedule 4 to pieces to show that is inaccurate in this respect or another respect. I think the whole thing has no merit at all. It is an attempt on the part of the defendant by a process of reconstructing the information shown on his bank accounts in order to arrive at a favorable figure of cash as of December 31, 1944. He is faced with the problem of explaining all of these \$92,000 worth of transactions, for which there is no source indicated in any records anywhere. So by adopting the expedient of

assuming that they all come out of the safe deposit box, he works backwards and at one and the same time accomplishes two purposes. He explains these receipts and establishes a \$72,000 beginning base point. If you believe [1355] him, I don't see how you can believe him, the fact remains that these large sums of money are unexplained, and by adding them back, as appears in Schedule 4, the resultant \$72,000 has no meaning. It has no more validity than the means used to reconstruct it. I submit that Schedule 4 supported as it is almost in the entirety by nothing other than the testimony of the defendant has no validity. Putting it in Schedule 4 doesn't explain otherwise unexplained receipt of \$6,000. It just doesn't do it. The \$6,000 is still somewhere in the air.

What about Mrs. Foote's money? Mr. Olender testified at page 891 of the transcript as follows:

“Q. Is it now your testimony that \$3,000 of that money was or was not money of your mother-in-law's, Mrs. Foote? A. It was.

“Q. It was money of your mother-in-law's Mrs. Foote? A. That's right.

“Q. And under what circumstances did your mother-in-law give you that \$3,000?

“A. Part of it came from Mrs. Widrin, as she testified, and I had the balance and I had the money in my safe deposit box.”

Where is that on Schedule 4? No place. It is another [1356] error in Schedule 4. But it is further proof that Schedule 4 can't carry the weight that the taxpayer seeks to impose upon it. It is

nothing but a recapitulation of a cash position which has no more validity than the component parts. Inasmuch as we have no record to establish where those receipts came from, there is no reason to believe that they came from the vault.

Yesterday afternoon there was put into the record documents from the Bank of America. Those documents you recall reflected that on July 11, 1945, the taxpayer borrowed \$30,000 on a 90 day loan. On that date, as Mr. Mytinger calculated for you, he had over \$61,000 in the bank per Schedule 4, as he would have you believe it. On August 22, 1946, he borrowed \$10,000 on a 90 day note, and Mr. Mytinger calculated for you figures which are still on the board. He had \$17,900, or \$18,000, roughly, depending upon whether you include or exclude the I. Magnin account.

Now, ladies and gentlemen of the Jury, if the taxpayer had \$61,000 cash in a safe deposit box in July of 1945, why did he borrow \$30,000 on a 90 day note, which, as you gentlemen who are business men know, is the typical short-term negotiation used to finance business transactions. Why did he borrow \$10,000 on August of 1946 if he had between \$18,000 and \$19,000 in cash, according to Schedule 4, in the vault? What's the answer? The answer is he didn't have the [1357] money in the vault, and I wonder whether the Government wasn't a little bit generous in giving him \$50,000 credit in 1944. It could well be.

Now I want to turn to the Goodman transaction. The Goodman transaction, according to the defend-

ant's testimony and those of the witnesses which were called, you will remember, is set forth in Schedule 1, the so-called flow chart, and that is the defendant's Exhibit AL. And that figure of course, the value of those suits, \$20,550, you will remember is the second large item which the defendant contends should be included in his net worth as of December 31, 1944, the beginning point. His Schedule 3 shows that those suits are on hand as of the end of the year. I might state that the understanding of the Government was that inventory figures for the Army & Navy Store for the three years in question covered the Goodman transaction and it was not until September 25, nine days after the trial began, we became aware for the first time that the defendant would seek to include those suits as additional inventory. Now to believe the defendant's story in connection with the Goodman suits you are going to have to believe and accept a number of correlary things that I think are simply beyond the bounds of credibility. In the first place you have to assume that those suits were bought and sold without the enjoyment of any profit or the suffering of any loss. It is by the defendant's explanation a complete [1358] wash entry, no hits, no runs, no errors. I don't see how you can believe it. And that, ladies and gentlemen, was in 1944 when every witness who knew anything about it, no matter whether he was called by the United States or the defense, testified they were in very, very short supply, they were hard to get. And Mr. Olender would have you believe that he acquired 822 of them and he got rid

of all of them and it came out just precisely even-Stephen. You believe it? I can't.

He would have you believe secondly that although the suits were purchased, by Mr. Olender's own testimony, in the opening months of 1944, January, February and March, he had 322 of them left on December 31, 1945, almost two years later. In the middle of the war he had 322 of them left. Do you believe it? It is more than I can accept. It just isn't in the cards, as I understand the conditions that existed in those days and as the witnesses had testified. To believe Mr. Olender's story that all of those suits were on hand at the end of '44 and he testified that he didn't include them in his 1944 inventory as reported on his Federal income tax return, there are two views which you might take of that, as I am sure the Court will instruct you. The law requires that income tax returns be truthful and accurate, and they are executed and filed under the penalties of perjury. Now if Mr. Olender knowingly failed to include those suits on [1359] his return with intent he has committed a crime. Of course he is not charged with that. He is being tried here for income tax evasion, wilful attempt to evade his income taxes. So whatever he did in connection with inaccurate filing of returns is not material insofar as the results of the offense are concerned with which he is being tried now.

If you don't—well, put it this way, if you believe he didn't have the suits, then his income tax return for 1944 is correct, but his whole defense falls. If you believe that he did have the suits and know-

ingly and intentionally failed to report them on his income tax return, then you may consider that in your determining as to whether or not he intended to commit the crime with which he is charged.

To believe the defendant's explanation of the Goodman transaction you have to believe that all suits that he got from Goodman were large sizes, and I read from the record:

“Q. It is your testimony that they were primarily large sizes?”

“A. They were all large sizes.”

I want you to examine the Government's Exhibits 38 and 39. These are the invoices that Leavy gave to Mr. Lerman, you will remember. Note that they bear the name George Goodman Sales Agency, 44 West Avenue, the address on the top. They also have Mr. Leavy's name on them in the lower left hand side, about halfway down, and there is a distribution [1360] of sizes shown. You will examine those (handing to Jury.)

Mr. Olender said categorically that they were all large sizes. As you have seen, those two invoices show a distribution of sizes from 35 to 40. Mr. Lerman testified and was examined on the question. I examined him on cross-examination. Mr. Lerman testified that he was an old friend of Olender's, had known him fifteen years, he saw him every week, they belonged to two or three clubs together. We might have thought that Mr. Lerman would go down the line for Mr. Olender. Did he?

Mr. Hagerty: If your Honor please, I cite that

as misconduct. We presume every witness tells the truth.

The Court: Counsel is entitled to, as you are, to make comments upon the credibility of a witness or upon that of the defendant, and he can use such colloquialisms as he desires.

Mr. Drewes: These were the questions and the answers:

“Q. Mr. Lerman, you testified that the majority of sailors in your experience were size 36 and size 38. There were many, many sailors who were larger than that, were there not?

“A. Yes. But as a rule the kids who used to be in the Navy, they were small boys.

“Q. But there were many who were not? [1361]

“A. That’s true. But I say the majority is 36 and 38.

“Q. With respect to the U. S. Exhibits Nos. 38 and 39, which are the invoices that you have identified, I call your attention to No. 38, which shows ten size 35’s. Did you get those suits?

“A. Well, I couldn’t remember that far back if I did or didn’t. But I remember this, that if we did get them, they were not to the size. I mean they were not—35, maybe 38.

“Q. The other invoice, Exhibit No. 39, there are fifteen size 35’s. Didn’t you get any size 35’s?

“A. Possible.

“Q. Both of these invoices are dated in 1945, in May, and that was the date of the transaction?

“A. That’s correct.

“Q. And that was some approximate seven years ago? A. That’s right.

“Q. And can you say now that you got no 35’s, no 36’s, no 37’s?

“A. If I got—received any, it was a very small proportion of what they should be, if I received any. But, however, I can’t recollect that far [1362] back.”

That is a long—that is a far cry from supporting Mr. Olender’s contentions that they were all large sizes.

In order to believe Mr. Olender’s explanation of the Goodman transaction you have to believe that although the suits which he got were all too large and unsatisfactory and he couldn’t use them.

Nevertheless, in the same year he later purchased another lot of suits from Mr. Goodman, some \$1,380 worth, as I remember. Why would he buy again from Mr. Goodman if his first experience was as unsatisfactory as he would have you believe?

In order to believe the Goodman transaction you have to believe that the 322 suits which he says were in inventory at the end of 1945 and which he identifies as Goodman suits and which are shown at a price of \$24.50, were priced in error. He contends that Goodman suits cost \$25. The defendant’s Exhibit N, which I believe you have seen before, shows 322 suits as of the end of the year at a price of \$24.50.

Here is the defendant’s Exhibit V, an invoice from the Dewey Sales Company, covering 100 suits at a price of \$24.50. Now that is dated March 8,

1946, which is three months after the closing inventory. There is no contention that the 322 suits shown in defendant's N at \$24.50 were these suits.

But isn't it more reason to believe that they were other [1363] suits which had been purchased at \$24.50? This exhibit establishes the fact that he was buying suits at that price. Do you believe that the \$24.50 is an error and that it should be \$25 or do you believe that the 322 suits were not Goodman suits but were suits purchased from someone else at \$24.50?

That leads me to the next point. To believe the Goodman transaction you have to believe, as I stated just a moment ago, that although these suits were purchased in early 1945, 322 of them were still in stock almost two years later. The Government Exhibit No. 54 shows that during the year 1945 Mr. Olender purchased 1578 suits at total cost of \$35,656, and that many of them were purchased late in that year. Do you believe that the 322 suits that were in inventory were purchased almost two years before or do you think that the 322 suits were the remainder of those purchased in 1945?

I don't believe you can accept the story, ladies and gentlemen. I don't think the mind can accept all of the various aspects of that story. It is too much. He is asking too much of you.

I will tell you what I think happened. As you know, the Goodman transaction has its origin in another investigation, and Mr. Blanchard questioned Mr. Olender in connection with his purchases from Goodman, and Mr. Olender didn't know any-

thing about it. He couldn't recollect anything except that \$1,380 purchase which came later. [1364]

A little later on Mr. Olender himself was under investigation, and very early therein, in 1948, Mr. Root was over in his store looking at his books. Mr. Root asked him about the Goodman transaction and he still didn't remember anything about it. But then the agents found the Lerman transaction, the \$5,000 you will remember was credited to his capital account, and the agents found it and they found the Saraga transaction, which is the \$7,000, and you will remember that the proceeds of that check went into his personal account. There he was. Now he had three transactions to explain, the Goodman transaction, of which he had no record whatsoever, and heretofore had no recollection, no part of it was on his books; then he had the Lerman transaction and the Saraga transaction. What to do? Well, he thought the Government's got the Lerman transaction. We've got 200 suits there that I sold and the proceeds have gone into my capital account. The price is \$25. I've got the Goodman transaction, which doesn't appear anywhere, and I have to explain the Saraga transaction. What will we do? Well, we will divide the \$20,550, that the agents know about—Blanchard questioned me about that—by \$25. There are no invoices at all, no record at all. We divide that figure by \$25, and we get 822 suits. Now we've already accounted for 200 of them in the Lerman transaction. Now what about the Saraga? Well, we'll divide that by \$25, and what will we get there? We [1365] get 280 suits. Well,

that leaves us with 242 suits left. What to do about that? He looks at his inventory records and at the end of 1945 there are 322 suits. Oh! You multiply those by \$25. That takes care of another big chunk of the \$20,550. There is only one thing left, we've got 20 more suits to account for. What happens to those? I sold them over the counter.

He has explained the Goodman transaction, the Lerman transaction, the Saraga transaction—if you believe him.

Do you believe that he couldn't get rid of those suits in almost two years? He had 322 of them left? Do you believe that the whole transaction was without profit, without loss, with the exception of possibly 20 suits that were sold in the store? They would be at a profit. Do you believe that the ending inventory price was a mistake? Do you believe that the 322 suits on hand at the end of 1945 were suits purchased two years before when he purchased over 1500 suits in that year, that very year—almost 1600 suits? I don't see how we can believe it.

Mr. Hellman testified that by including the value of the so-called Goodman suits at the end of 1945 in the inventory and not including them in purchases that the defendant thereby overstated his profit for the year 1945. You remember that? And I asked him on cross-examination to calculate what the actual gross profit ratios were for 1944, 1945, and [1366] 1946, and lo and behold 1945 was the lowest gross profit ratio of any one of the three years.

Then ask yourselves this, if that is so, were the

Goodman suits picked up on inventory for the first time and was there an overstatement of profit resulting therefrom? The question brings with it, I think, its own answer.

I wonder if we may take the recess, your Honor?

The Court: Take the afternoon recess, ladies and gentlemen, with the same admonition to you not to discuss the case or form an opinion until the matter is submitted to you.

(Short recess.)

Mr. Drewes: Now I want to discuss with you the so-called Lerman transaction, the two invoices pertaining to which you have already examined. Mr. Leavy testified concerning that transaction, and I want to read this particular part of it to you. This is Mr. Leavy who allegedly sold the suits to Mr. Lerman:

“Q. In the course of that transaction did you ever tell Mr. Lerman the source of these suits?

“A. No, sir, never told him who they came from.

“Q. Why didn't you?

“A. Because I don't believe that Mr. Lerman would have bought them, and I don't believe Mr. Olender would have sold them to Mr. Lerman on account of competitors.” [1367]

Mr. Hagerty: I don't mean to interrupt you. Could I have the page you are reading from?

Mr. Drewes: Page 153, Mr. Hagerty.

I will read that again.

“A. Because I don't believe that Mr. Lerman would have bought them, and I don't believe Mr.

Olender would have sold them to Mr. Lerman on account of competitors.”

Now Mr. Lerman testified yesterday, and part of his testimony is as follows:

“Q. You were very glad to get those suits (referring to the so-called Goodman suits, the 200 sold through Mr. Leavy to Lerman). You were very glad to get those suits, weren’t you?

“A. Very much so.

“Q. As a matter of fact, not long ago in my office you said that they were just like gold to you?

“A. That’s right.

“Q. You remember that. You have known Mr. Olender for quite some time, have you not, Mr. Lerman? A. Yes, I have.

“Q. About how long?

“A. Oh, I imagine about—I have known [1368] him off and on for at least fifteen years or maybe longer than that, but more closer since I went into that line of business.

“Q. And speaking of that ‘that line of business,’ during the years in question?

“A. During the years 1942 to 1947.

“Q. Between the years 1942 and 1947 did you sometimes buy merchandise from Mr. Olender when you were short and did he sometimes buy merchandise from you?

“A. Well, there was a reciprocity between dealers to help one another.

“Q. And you sometimes helped Mr. Olender by giving him merchandise when he was short and—

“A. Occasionally.

“Q. —and he sometimes helped you by giving you merchandise when you were short?

“A. Occasionally.

“Q. You would say, would you not, that you were friendly competitors? A. We were.

“Q. And is it not true, Mr. Lerman, that you and Mr. Olender belonged to clubs, the same clubs in Oakland? A. That is true. [1369]

“Q. What clubs do you belong to?

“A. We belong to the Lion’s Club, belong to the Shriners’ Club, the Athens Athletic Club.

“Q. Do you see Mr. Olender almost every week?

“A. Practically every week at luncheon on Wednesday, particularly the Lions Club.”

Now the record in the case shows in connection with this particular transaction that Mr. Lerman drew two checks, which are the Government’s Exhibits 43 and 44, each in the amount of \$25, and they were payable to the American Trust Company.

Mr. Hagerty: Mr. Drewes, I think you said \$25. Isn’t that \$2,500?

Mr. Drewes: I beg your pardon. Yes, \$2,500, payable to the American Trust Company. He then went down to the American Trust Company and purchased the Government’s Exhibits 34 and 35 in the same amount, cashier’s checks payable to Mr. Leavy in each case, and the register of the American Trust Company, which are these two exhibits, 36 and 37, tie the two in together and show that the personal checks of Mr. Lerman were used to purchase those two cashier’s checks. And he went to Mr. Leavy and got 200 suits, and Mr. Leavy

made out these two invoices, which you have, Exhibits 38 and 39. But they are made out on the invoices, which are printed invoices of the George Goodman Sales Agency in New York. [1370]

Well, now, why? What's the answer? Mr. Lerman and Mr. Olender are old friends. They belong to the same clubs. They are friendly competitors. They help each other out. One man provides the other with goods when he is short. Mr. Lerman said that the suits were just like gold to him. Why didn't Mr. Olender walk across the street—the two places of business are very close together—and say, "Hey, Lerman, I have some suits from Goodman. I haven't got a tailor. I can't use them. Would you like them?" And Lerman would say, "They're just like gold to me. How many have you got?" And Mr. Olender would say, "Two Hundred." He may say the whole 822, the inventory. Whereupon Lerman would say, "I'll take them," and sit down and write out a check on Lerman's own account, just pay to Milton Olender \$5,000 and hand him a check. Isn't that what you would expect with that relationship existing between the two parties?

But, no. What does Lerman do? He writes out his own checks payable to the bank, gets two cashier's checks payable to Leavy, gives them to Leavy and gets back these two invoices on the George Goodman Sales Company letterhead.

What sense does that make? What's the purpose of all that devious turning of corners? What is the purpose of it all? What's the purpose of it all? Why not walk across the street and say, "Look,

I've got the suits. Do you want them?" [1371]
"Sure."

Well, I'll tell you what I think. I don't know, and the only people that know are Leavy, Lerman and Olender, as the record shows now. It's unexplainable. There is no sense to it. I have a theory. I'll tell you what it is. These Goodman sales invoices are pure phoneys. Leavy, Lerman and Olender are covering their tracks. And why are they covering their tracks? Why this peculiar, distorted, exaggerated means of handling what ought to be a very simple transaction between two friends, one of whom had suits he didn't need, the other of whom wanted suits very badly? Why? I think it is because Mr. Leavy, Mr. Olender and Mr. Lerman were all involved in the illicit trading in sailor suits in violation of Government regulations at that time. In other words, they were dealing in the black market, all three of them. Mr. Leavy was buying the suits. He was the man that had the contacts. He was going east or wherever one goes to get sailor suits in getting them, and Mr. Olender was the banker. He was handling the funds and he was handling them out of his cash in the safe deposit vault in the bank, and Mr. Leavy got suits somewhere and they were shipped out to San Francisco or Oakland and 200 of them were Mr. Lerman's share. Mr. Olender had already paid for them, financed it out of cash out of the vault, and when Lerman got his suits he reimbursed Mr. Olender for his share of the suits, and he didn't just write out a check and hand it to Mr. Olender. He covered his [1372] traces by buying

cashier's checks, giving them to Leavy and getting in return these two ostensible invoices. Whose suits? Nobody knows. But Mr. Leavy got them some place and Mr. Olender paid for them and Mr. Lerman's share was \$5,000 and he paid it to Mr. Olender for his share of the suits in this devious manner shown.

Counsel has called my attention to a part of the record which had slipped my mind. Specifically this, Mr. Leavy had no returns of these transactions either. Here is Mr. Leavy's testimony:

"Q. Do any of the transactions in which you engaged on behalf of Mr. Olender to which you have testified appear in your books?"

"A. You are talking regarding sailor suits?"

"Q. That is correct, the sailor suits, the transactions to which you have testified.

"A. No, sir, for the reason that I was not in that business. I just acted as an agent and buying those sailor suits for Mr. Olender, I just done it as a favor for him because they were very difficult to get at that time."

What I have just said to you is a theory, it is a hypothesis, but it makes sense, and certainly the transaction, the Lerman transaction, as it stands in the record unexplained now makes no sense whatsoever. There is no reason in the [1373] world why a man who knew each other as well as Lerman and Olender did would find it necessary to handle a transaction of that kind in the way it was handled. According to Mr. Olender's story he had suits that he couldn't use because he had no tailor and they were too big. According to Mr. Lerman he had a tailor and they were just like gold to him. And

they met every month—pardon me, they met every week at clubs to which they both belonged. Why handle the transaction, why cover traces, why issue invoices covering sales on the letterhead of a firm in New York, why use cashier's checks instead of writing a check directly from Lerman to Olender? I have suggested to you my explanation.

Now referring again to the Schedule 3, as you know it, that has been referred to most commonly in this trial as defendant's Exhibit AK. You will note that the defendant has reduced the net worth for 1945 and 1946 by deducting therefrom \$20,000, which is the value of the bonds which, according to his testimony, were the property of his mother, and, of course, it is to his advantage to reduce the net worth in those two years, as I have previously explained to you.

Now we think that the bonds belonged to him, the taxpayer. In the first place he had possession of them. They were in his safe deposit box. In the second place, he reported the interest on those bonds on his 1947 income tax [1374] returns. That he admitted when he testified on the stand. You recall he had furnished to Mr. Ringo information upon which his 1947 and 1948 returns were based, and when it was pointed out to him that the difference in interest shown in the two was \$450 and that that would be the interest at two and a quarter per cent on the \$20,000, he stated that that was the interest, the \$450 that he had returned in 1947 was indeed the interest on his mother's bonds. But he says, "My mother returned the interest on her in-

come tax for the preceding year 1946." And that is the defendant's Exhibit AK.

The income tax return, as probably many of you know, provides for the reporting of interest and dividends only in a lump sum, so by examining this return, as indeed any return, in the absence of any further information it is impossible to tell from what source that interest came or from what source dividends were received, and so the defendant's testimony that his mother reported the interest the preceding year is unsupported—that is, his own testimony, is unsupported by any documentary evidence in the case. He testified that his mother returned interest on the \$20,000 in 1948, which, of course, was the next year. But I, of course, refresh your recollection by calling your attention to the fact that that was after the investigation began in this case. The 1948 return would not have been filed until [1375] the early months of 1949.

Now, ladies and gentlemen, the Government insists that its net worth figures are substantially correct and the Court will charge you, I am sure, that the Government need only prove a substantial understatement of taxable income.

I am going to demonstrate to you why we insist that our net worth in 1944 is correct by approaching the matter in another way. You probably long since have forgotten that very early in the trial I introduced into evidence the income tax returns of the taxpayer for the years 1942 and 1943 as well as 1944, and they were introduced over the objection of counsel as being immaterial, and I pointed out

to the Court at that time that the purpose of putting those returns in was to support the starting point, the net worth as of the beginning period, 1944, and we also put into evidence certain forms and reports which are called certificates of assessment, and I explained to you at that time that they were calculations by the Bureau of Internal Revenue as to taxes actually paid during the years in question, and the certificates which were permitted into evidence covered the periods 1942, 1943, 1944, and 1945, and I think even beyond that.

Now my purpose of doing that was also to further support the Government's base period. Government's Exhibit No. 24 admitted into evidence is a comparative net worth statement [1376] which was prepared by Mr. Ringo for Mr. Olender and submitted to the Bureau of Internal Revenue at the request of the agents. It has been subscribed and sworn to by Mr. Olender, as you will note. I am going to ask you to examine this just briefly, with particular reference to the net worth figure which is shown for December 31, 1941. (Handing to jury.)

Now I have put on the board his sworn net worth as of the last day of December, 1941.

To that adding income 1942—Is this angle all right? Can you see it—1942—1944. Now this is as reported on the returns which are in evidence for those years. And the figure is \$89,431.60, giving a total of \$228,335.51. Now, as you know, from that must be deducted taxes paid for those years, and they are included in the certificates of assessment that I referred to just a little while ago, and they

amount to \$16,871.07. That results in an indicated net worth of \$211,464.44 as of December 31, 1944.

Now the Government's computation of his net worth as of the last day of December, 1944, is \$191,002.07. The difference between the two is \$20,462.37. So the beginning net worth as contended for by the Government in this case and the net worth as reconstructed, going back to 1941, as I have just done, beginning with the sworn net worth of the taxpayer [1377] in 1941, adding his income as reported, deducting taxes, is only \$20,462.37 difference.

Now what about living expenses? If we divide the \$20,462.37 by three we get something under \$7,000 a year. He has got to be charged something for living expenses. The \$20,000 could be living expenses. Do you think it is unreasonable for a family of five, the head of which has assets of \$138,000, nearly \$139,000, in 1941? Do you think it is unreasonable for that family to spend as much as \$7,000 a year living expenses? I don't think it is unreasonable. And the stipulation in this case shows that the Olender family spent \$24,000 in non-deductible living expenses in 1946 alone, and \$19,000 in 1945, and purchased \$24,000 worth of furniture at W. & J. Sloane in 1946, paid for in the next year. You have seen the Magnin's and the Gray Shop bills. Do you think it's reasonable that that family would spend \$7,000 a year in those three years and thus account for the \$20,000 difference between the Government's net worth in 1944 and the net worth

as reconstructed from 1941? I think it is entirely reasonable.

But even if you disagreed with me, even if you disagree with me, you have got to allow something, some reasonable figure for living expenses, and if you do—then where is the Goodman transaction?

Now we start in 1941 in our calculation here, long [1378] before Mr. Goodman ever got himself into this case, long before. What about the cash in vault? Where is the room for that? You know the answer—there isn't any room. The Government's calculation is substantially correct. There may be a little leeway, a thousand dollars here, a thousand dollars there. There is no room for \$22,000 cash in bank and there is no room for \$20,000 in Goodman suits.

Now would you be kind enough to turn to Schedule 3-A. I want to discuss with you briefly the three items which appear under "Non-taxable gifts received."

If your Honor please, I have misplaced one of my references to the transcript.

The Court: It is approximately four o'clock. I suggest we resume at ten o'clock tomorrow morning, ladies and gentlemen, with the same admonition to you not to discuss the case nor to form an opinion on the matter until it has been submitted to you.

(Thereupon the adjournment was taken until ten o'clock a.m., Thursday, October [1379] 9th, 1952.)

October 9, 1952—10:00 A.M.

The Clerk: U. S. vs. Olender, on trial.

Mr. Drewes: Ladies and gentlemen, following argument yesterday afternoon my colleagues called my attention to the fact that I had made an error when I told you that in 1945 the defendant was charged with non-deductible living expenses per the stipulation of \$19,000, and with non-deductible living expenses of \$24,000 for the year 1946. I had overlooked the fact that the non-deductible expenditures in the amounts that I have just mentioned, which are on the stipulation, also included taxes paid in those two years. So if taxes are taken out of the figure, we find that in 1945 the defendant and his family spent \$16,341.94 for living expenses and in 1946 something over \$17,000. I beg your pardon again. I have made still another error, and I hope that you in view of the complexity of these matters won't hold it too much against me. The figures which I gave you are not the living expenses but the tax figures and therefore the difference is approximately—put it this way, in 1945 the defendant and his family spent approximately \$3,000, and in 1946 approximately \$7,000.

Is that correct, Mr. Shelton?

Mr. Shelton: Yes.

Mr. Drewes: Those are the living expenses with which he [1380] is charged, the smaller figures. The larger figures are the tax figures.

It was quite late in the day when I explained to you our computations in support of the Government's beginning net worth. It will take only

a moment—I think it might be wise if I did that again for you. These are figures on the board.

The figure, Government net worth, \$191,000—that is the 1944 beginning point—and that is shown on the Government schedule which you all have.

Net worth as of December 31, 1941, \$138,903, is the net worth for 1941 as submitted to the Government by the taxpayer, and you examined that particular exhibit, that is, No. 25.

Now the defendant would have you add to our figure of \$191,000 over \$40,000 in two items alone, \$22,000 beginning cash, and the \$20,550 which is the Goodman transaction, and, of course, if you adopt that view of the matter, then the understatement for the year 1945 is substantially eliminated.

So to test the validity of the Government's beginning net worth, we start with the net worth as submitted by the taxpayer, and it is to his advantage, you recall, to make that figure as large as possible at all times, and you recall that that was long before the Goodman transaction began and long before any gifts were—any alleged gifts could have been received by the defendant from his mother. [1381]

So starting with the \$138,900, which is the net worth as of 1941, we add the defendant's income for 1942, 1943, 1944, as shown by his returns for that year, which is the \$89,000 plus, and we get \$228,000 plus. Then we deduct from that the taxes which he paid in those years, \$16,871, and we arrive at a figure, net worth figure, a raw figure of \$211,464.

Now the difference between this figure and the Government's beginning net worth is \$20,462.

Now out of that \$20,000 something has to be deducted for the living expenses of the family, of Mr. Olender and his family. If you believe that it is reasonable to conclude that he spent as much as \$7,000 a year during those three years, the entire \$20,000 is accounted for and the Government's beginning net worth is substantially correct.

I submit to you that what you have now learned of the personal affairs of this taxpayer and his family, that's entirely reasonable. But, in any event, you have to allow something for living expenses, and no matter what you allow there is no room to include the Goodman transaction, and there is no room to include \$22,000 of additional cash. It just does not fit.

So I submit to you that the Government's beginning net worth of \$191,000 is substantially correct.

Now will you turn to the defendant's Schedule 3A that is [1382] in evidence, the original, as the defendant's Exhibit AK. There you will see that he has in 1945 deducted \$6,075 from his income. Now that is deducted because that is income (if you believe he received it) which came to him by way of gift and was not taxable. That consists, as you see, of three items, and I want to take those up with you in turn.

The first is the \$3,000 gift allegedly received from his mother on January 2, 1945. Now that is one of three which appear, you will recall, on Schedule 4.

You might just look at that briefly. That appears as the first item in 1945 as an addition to the safe deposit box, Schedule 4, and then if you look above in 1944 you will see a gift from mother \$2,500 on July 5, and \$1,000 on December 15.

Those three gifts are three of five gifts which the defendant testified he received from his mother. The first one was received, according to the defendant's story, on February 3, 1942, in the amount of \$1,000, and the second on March 31, 1943, in the amount of \$1,000. Those two, of course, are not included in the defendant's exhibit and in Schedules 3, 3A and 4, because they were allegedly received in the years prior to the years with which we are concerned. Nevertheless, the testimony as to all five is substantially the same.

Now the taxpayer testified that he received those gifts [1383] in those amounts on those dates and he testified that they came from the Fresno bank accounts of his mother. Now as to the three—

Mr. Hagerty: Now, if your Honor please, I think that is a misstatement of the evidence.

Mr. Drewes: I intend to read the record, your Honor.

Mr. Hagerty: He testified where it came from.

The Court: Counsel said he intended to read the record.

Mr. Drewes: This is preliminary. I am going to read the record.

The Court: All right.

Mr. Drewes: As to the three later gifts which are included in the schedules that you have, he

testified on direct examination—Mr. Hagerty, I believe, was questioning him, and then as to all five he testified again on cross-examination when I questioned him. Now as to those five transactions, when I examined him, he testified as to—without any doubt or without any equivocation at all, as to the first four of them. When he got to the fifth one he must have had an intuition, he must have had a feeling, a sixth sense that he was getting into trouble, and he waived just a little bit, and then he gained heart and came back again.

Let me read that to you. First I am going to read his [1384] testimony on direct examination beginning at page 416:

“Mr. Hagerty: Oh, I am sorry, it is Exhibit 25 for identification. 24 is in evidence—Government’s Exhibit 25 for identification, the last sheet thereon indicated as being Schedule A. Does that, after reading that, does that refresh your memory as to gifts you received from your mother? A. It does.

“Q. Could you tell us what gifts you received and when you received them as outlined there?

“A. You wish them from 1942 on?

“Q. No, just during the period that is involved, 1944, ’45, ’46.

“A. On January 6th, 1944, there was a \$2,000 gift. On July 5, 1944, \$2,500. On December 15, 1944, \$1,000. On January 2, 1945, \$3,000.”

Now, those are the three amounts, the three dates that came from his mother by his story. Those are the three items which you have in front of you in the schedules.

Now I questioned him on cross-examination and this begins at page 456:

“Q. I show you, Mr. Olender, Government’s Exhibit 24 for identification, particularly with respect to Exhibit 7, Schedule A. You testified this morning, Mr. Olender, that that schedule [1385] represents gifts from your mother to yourself, is that correct? A. Yes, sir.

“Q. And I note that the schedule is entitled, ‘Withdrawals from savings accounts in Fresno.’ What is meant by that, Mr. Olender?

“A. That is where the funds came from.

“Q. From what savings accounts in Fresno?

“A. She had two savings accounts in Fresno.

“Q. Where were they?

“A. One in the Bank of America, one in the Security First National Bank.

“Q. And where, for example, in the first item where the date is shown as February 3, 1942, and the amount of \$1,000, does that mean that there was a withdrawal from one or the other of those two banks on that date? A. Yes.

“Q. And in that amount? A. Yes.

“Q. And on March 31, 1943, your mother withdrew \$1,000 as a gift to you? A. Yes.

“Q. And withdrew it from one or the other of those two banks? [1386] A. Yes.

“Q. Similarly on January 6, 1944, she withdrew \$2,000 from one or the other of those two accounts and gave it to you? A. Yes, sir.

“Q. What disposition did you make of those funds, if you recall?

“A. Some of it I put in my safe deposit box, some I used in other ways.

“Q. Well now, you state that you put it in your safe deposit vault. In what form?

“A. Currency.

“Q. She made the withdrawal and gave it to you in currency? A. Yes.

“Q. On July 5, 1944, did she withdraw \$2,500 from either of those two accounts and give it to you?

“A. It says so in there.

“Q. Was that true? A. Yes.

“Q. And on December 5, 1944, she withdrew \$1,000? A. December 15.

“Q. I beg your pardon, you are correct. [1387]

“A. Yes.

“Q. And on January 2, 1945, she withdrew \$3,000 from either one of those two accounts and gave it to you in currency? A. Yes, sir.

“Q. In every case it was currency?

“A. Yes, sir.”

Now, he begins to, I guess, smell a rat. He loses his courage.

“Q. And you put it in your safe deposit vault or made some——

“A. I don't know where I put it. I put it somewhere.

“Q. Other than your safe deposit vault where would you have put it?

“A. I might have deposited it in one of my accounts, I am not sure.

“Q. Would your bank records show deposits of those sum as of any of those dates?

“A. They may or may not, I don’t know.

“Q. You could examine your records for us, couldn’t you, and let us know?

“A. Yes, I could. I haven’t.

“Q. But there is no question in your mind that with respect to Exhibit 7 which is in front [1388] of you as to each one of those accounts your mother withdrew that sum from either one of the two banks which you have designated on the dates shown and gave the money to you in cash?

“A. I am not positive that the money that came out of those banks was given to me. She may have taken money those same dates from some other place, but she definitely withdrew that amount of money on those dates either from the bank or some other bank and gave the money to me. But there are positive withdrawals on that date, and I checked with my mother to make sure they are correct.”

Then he takes heart.

“Q. There are positive withdrawals on each one of those dates? A. Yes.

“Q. And the money was given to you?

“A. Yes.”

Now, ladies and gentlemen, what does the record show? Here are the official records of the Bank of America in Fresno, where Mrs. Olender had her account. This is the official record of Mrs. Olender’s account in the other bank which she used, the Security First National Bank. And you recall Mr. Whiteside testified that he was unable to locate any other bank accounts of Mrs. Olender. The

record [1389] shows that on February 3, 1942, Mrs. Olender withdrew from one savings account, she withdrew \$1,000, and put it in another savings account and there was no subsequent withdrawal of a similar amount. On March 3, 1943, she withdrew \$1,000 from her savings account and had put it in her commercial account, and there was no withdrawal of a similar amount. On January 6th, 1944, she withdrew \$2,000 and put it in Terrys Olender Gambor's savings account. She, you will recall, is the sister of the taxpayer. There had never been any withdrawals from that account. On January 5, 1944, she withdrew \$2,500 from the Security First National Bank. The withdrawal slips cannot be found and nobody knows what happened to that sum. On December 15, 1944, she withdrew \$1,000 from her savings account and put it in her commercial account, and there were no similar withdrawals. On January 2, 1945, she withdrew \$3,000 from her savings account and put it in Terrys' savings account, from which there have never been any withdrawals.

Mr. Hagerty, unquestionably, or Mr. Lewis, in behalf of the defendant, is going to tell you that Mr. Hellman testified that Mr. Olender told him that there were duplicate gifts made to Terrys and to the taxpayer. But the bank records don't support it.

There were no duplicate withdrawals, just the withdrawals in the amounts and on the dates that I have read to [1390] you, and with respect to two of them they went into the commercial account of Molly Olender.

Ladies and gentlemen, that evidence speaks for itself. The taxpayer's story is false and is not to be believed in any part. The gifts which he has indicated as coming from his mother on Schedule 3 and Schedule 4 could prove it never to have been received.

The next item on Schedule 3A, he deducts \$575 which he received in 1945 (by his testimony and by the testimony of Mrs. Widrin who, you remember, appeared very early in the trial.) She testified that she had given the money to the taxpayer.

The defendant's Exhibit AE, his personal checks, show that on August 26, 1945, he drew a check payable to the Belmont Memorial Park in the amount of \$510. They show that on August 26, which is the same date, he drew a check in the amount of \$50 payable to a florist. On September 12th, 1945, he drew a check in the amount of \$407.27 payable to N. Gray & Company. And on September 12th, 1945, he drew a check in the amount of \$51.39 payable to a florist. I stand corrected. The August 26th payment of \$50 was to a funeral home, I believe. It is difficult to read the name of the payee.

The money he got in 1945 from Mrs. Foote he immediately or very shortly thereafter expended for the purposes indicated, [1391] and the money having come in and gone out in the same year, that item has no place on Schedule 4.

Now finally with respect to Mrs. Foote's \$2,500. The defendant testified that he had received a sum

of money from Mrs. Foote. On page 411 of the transcript, questioning by Mr. Hagerty:

“Q. In the year 1945, did you ever receive any funds from Mrs. Foote?

“A. I received \$2,500 from Mrs. Foote.

“Q. And would you explain the transaction to his Honor and the ladies and gentlemen of the jury?

“A. Well, Mrs. Foote had been saving considerable money for several years, and she was in her eighties, she had lived with me since practically the day I was married, until 1939, and she gave me that money for a specific purpose.”

He testified that she had been saving up the money for a period of years and gave it to him for a specific purpose. Later in the trial, in response to questions asked of him by Mr. Shelton as follows:

Page 891:

“Q. Is it now your testimony that \$3,000 of that money was or was not money of your mother-in-law's, Mrs. Foote? A. It was. [1392]

“Q. It was money of your mother-in-law's, Mrs. Foote? A. That's right.

“Q. Under what circumstances did your mother-in-law give you that \$3,000?

“A. Part of it gave from Mrs. Widrin, as she testified, and I had the balance and I had the money in my safe deposit box.”

That is in 1945. Now, in the first place, ladies and gentlemen, the money isn't shown on Schedule 4 as being in the safe deposit box. That very care-

ful reconstruction of what happened to the money, the source of which nobody understands, the \$2,500, the source of which is testified to, is not on Schedule 4. But, secondly, of greater importance, the record shows that Mrs. Foote never had \$2,500. We put it into evidence, and I read to you extracts from the official records of the Department of Public Welfare in Fresno County. Mr. Jensen testified that Mrs. Foote had been on relief from 1936 until 1943, and the records which are in evidence show from bank reports, from investigations conducted by the social service workers, from statements by Mrs. Foote herself, that during the period, at least from 1939, which was the date, you remember, she transferred from Oakland to Fresno County, that at least in 1939 the most she ever had was \$152 and some cents in a joint account in Oakland with Betty Olender. The conclusion again, I think, leaves no doubt there never was a [1393] \$2,500 belonging to Mrs. Foote and Mr. Olender never received it.

The defendant's story, ladies and gentlemen, is about 95 per cent fabrication. As His Honor will instruct you, if you find the defendant has testified falsely in any material respect, you may consider all of his testimony—you may disbelieve all his testimony.

I want to point out to you some thirteen instances where the record shows that the defendant either contradicted himself or was contradicted by competent evidence of other witnesses or in the records which have been admitted into evidence in this trial.

1. He testified on this trial at great length as to

the details of the Goodman transaction. This is 1952. In 1948 he told Mr. Blanchard that he had no recollection of any of the details of the Goodman transaction save and except the \$1,380 transaction which occurred later. You recall that Mr. Shelton questioned Mr. Olender in connection with his sworn statement to Mr. Blanchard. Here is the record, beginning at page 813:

“Q. (By Mr. Shelton): Mr. Olender, I will ask you if, in the course of that statement, you were not asked the following question and did not give the following answer, and if the Court and jury please, this is the second question on the [1394] statement:

“‘Q. At this time it becomes my duty to advise you that under the Constitution you are not required to incriminate yourself, and to inform you that anything you may say, and any documents that you may produce at this hearing, can be used against you in any proceeding which may hereafter be undertaken by the government. Do you understand that?

“‘A. Yes, I do.’

“Now, Mr. Olender, were you asked that question and did you give that answer?

“A. I presume I did.

“Q. I will ask you if you were not asked the following questions and did not also give the following answers as indicated?

“‘Mr. Olender, in the year 1944 did you have occasion to do any business with a George Goodman? A. Not directly.

“Q. You did not have any relationship with him? A. Not that I remember.

“Q. Not that you remember?

“A. Not that I remember. [1395]

“Q. Did your store have any?

“A. Just one invoice, whether it was with him or not, I do not remember how that deal came about.’”

Then Mr. Shelton asked him:

“Were you asked those questions and did you give those answers? A. I believe I did.

“Q. I will ask you if you were asked the further question and gave the answer as follows:

“Q. I show you a check dated September 25, drawn on the Bank of America National Trust and Savings Association, No. 1806, and ask you whether that is the check drawn by you in payment of that invoice?

“A. It is.’”

And then Mr. Shelton:

“One further question and answer:

“Q. Is that the only money that you paid to Mr. Goodman?

“A. The only money that I know of.’”

And then Mr. Shelton:

“Now, Mr. Olender, I will ask you whether or not that first question of those two was not related to the \$1,380 Goodman transaction which is [1396] on your books and which has been testified to on this trial?

“A. It could be, I don't remember it.

“Q. I will ask you further if you were not asked the following question after some transactions had been outlined:

“‘Q. But otherwise than the foregoing transaction’—

and it is singular, evidently referring to the \$1,380 transaction—

‘you never purchased any other sailor suit or merchandise from Mr. George Goodman?

“‘A. To the best of my knowledge and belief, no.’

“Were you asked that question and did you give that answer? A. I presume I did.

“Q. I will ask you if you were asked the following further questions and gave the following further answers:”

This is by Mr. Blanchard:

“‘Q. Can you tell me when those transactions were had?

“‘A. I do not remember. They were in February [1397] of 1944, I believe.

“‘Q. You had no transaction of any kind?

“‘A. No record of any such transaction.

“‘Q. Your records do not disclose any such transaction? A. No.

“‘Q. This was in 1944, I see. Well now, Mr. Olender, I think I would like to show you some things. Now, Mr. Olender, I show you an application dated January 10, 1944, signed with your signature, apparently 1026 Broadway, and ask you whether you purchased the

cashier's check in the Bank of America National Trust Association, main branch, which I now show you photostat copies of, together with the applications.

“ ‘A. I have no record of those whatsoever.

“ ‘Q. It is your signature, isn't it? You will note, Mr. Olender, that they were purchased for cash, and here I show you again this application—here—“cash”—Olender, 1026 Broadway. Cash—see 73962; this is 73962.

“ ‘Mr. Metlar: Application numbers.

“ ‘A. I have no record of them whatsoever, [1398] nor do I remember them. That 6750 is one Mr. Goodman asked me about, and I have no record of it.’

“ ‘Mr. Shelton: Did you give those answers to those questions? A. I believe I did.

“ ‘Q. Mr. Olender, I will ask you if you were also asked the following questions and gave the following answers:

“ ‘Q. Now, Mr. Olender, have you any explanation whatever to make?

“ ‘A. A single transaction with Mr. Goodman for \$1,380 and the single transaction with Seagoing evidenced by the invoice No. 9662 constitute the only completed transactions I have record of. If there were any other transactions, they were never complete. When I say “completed” they were such as the check I showed you for \$27,000, check for \$50,000, which were returned to me.

“Q. The checks which I have shown you were apparently all paid into the account of Mr. Goodman, or the Seagoing Uniform Company. I'll show it to you, Seagoing Uniform, Seagoing Uniform, George Goodman, [1399] Seagoing Uniform, Seagoing Uniform, Seagoing Uniform, Lafayette Bank, Seagoing Uniform. Same thing here.

“A. I have no recollection of having paid those checks or purchased them, or of having received merchandise for them. If I got merchandise, I didn't keep it.’

“Were you asked those questions and did you give those answers? A. I believe I was.

“Q. I will ask you if you were asked the further questions and gave the further answers:

“Q. The transactions which you speak of appeared in your bank account in the Bank of America. They were withdrawals, withdrawn on that account. Did you ever draw any checks covering these sums?

“A. I have no recollection now. I would have to check my books; during the early years I had many cashier's checks drawn—many of them. They are on my records, as far as I know, because in those days I had no credit and had to send the checks in advance.

“Q. 1944? A. In 1944. [1400]

“Q. This is 1944 we are speaking of?

“A. I sent many cashier's checks in those days.’”

Now this is Mr. Shelton:

“Q. Mr. Olender, I will ask you if it isn’t true that about a week before you gave this sworn statement from which I have read Mr. Medbury Blanchard came to your store in Oakland?”

“A. I wouldn’t know when he came. He came there before that affidavit.

“Q. He came there shortly before you gave this sworn statement, did he not?”

“A. I wouldn’t know how much before, but he came there before.

“Q. Was it rather shortly before?”

“A. I wouldn’t know that.

“Q. I will ask you whether or not at the time that Mr. Blanchard came to your store he did not tell you that he was investigating transactions of George Goodman? A. I believe he did.”

Now, ladies and gentlemen, the defendant has presented to you by himself through his witnesses an elaborate detailed story as to the nature of the George Goodman transaction. But in 1948 he told Mr. Blanchard that he had no recollection [1401] of those transactions other than the one which was on his books, the one for \$1,380.

That’s not all. Secondly, Mr. Root, you will recall, spent some time in the Army and Navy Store, and while he was working there he had a conversation with Mr. Olender. That was early in 1948. He had a conversation with Mr. Olender and again Mr. Olender stated to him that he had no recollection of the George Goodman transactions other than the one which was on his books.

Thirdly, Mr. Ringo, who was employed by the defendant for the purposes of constructing the comparative net worth statements submitted to the government by the taxpayer, was himself unable to discover the details of the Goodman transaction. On page 72 of the transcript Mr. Ringo testified:

“Q. (By Mr. Drewes): What did you ask Mr. Olender about the Goodman transactions and what did he reply?”

“A. Well, I asked him if he bought these goods from Goodman and what was done with the goods, and they—we never were really able to get the whole story on it. The Goodman transactions weren’t entered into the books, as far as we could find.”

So Mr. Ringo himself, the defendant’s own accountant, was never able to solve the Goodman transactions. Yet you have presented to you in September of 1952 a detailed, painstaking [1402] explanation of the entire transaction, if you believe it.

Fortunately, the defendant testified that the Goodman suits—that he had Goodman suits in inventory on December 31, 1944, and yet he frankly admitted that he had not included them in his federal or state income tax returns. That we have already discussed.

Fifthly, you may recall that during the course of the trial, during the course of the explanation of the Goodman transactions, it became apparent, and under the circumstances appeared to me for the first time that 322 suits which were shown in the inventory as of 1945 and allegedly were Goodman suits,

were at the wrong price. They were supposed to be \$25 and here they were in the inventory at \$24.50. I believe the Court raised the question as to that discrepancy. One of the defendant's counsel had an answer. Let me read it to you. Page 404:

“Mr. Hagerty: I believe just before we recessed, your Honor brought up something about the difference in the inventory item of \$7,899 as against the other item of \$8,550 shown on the chart. That error is accounted for by a mistake in pricing on the inventory sheets that reduced the price 50 cents and there is also 20 suits out of the item.”

There was a mistake of 50 cents. Mr. Olender reaffirmed that point at page 580 of the [1403] transcript:

“Q. The purchases from Goodman were priced at \$25? A. That's correct.

“Q. You testified that \$24.50 in the record is an error? A. Yes, sir.”

Now much later in the trial Mr. Hellman testifies as follows—at page 1014 of the record:

“Q. And the balance of 342 suits were subsequently alleged to have been taken into inventory at cost, is that correct?

“A. 322 of the 342 were taken into inventory at cost. No, they were not taken in at cost. They were taken in at cost or market.”

There is an error here; it says “cost for marketing.” It should be “cost or market.”

“They were taken in at cost or market. They
December 31, 1945.

“Q. How do you know that, Mr. Hellman?

“A. The inventory sheet shows 322 suits at \$24.50 and Mr. Olender testified that those were the suits in question.

“Q. Do the inventories to which you refer show the figures of \$24.50 as the cost or market?

“A. The figure itself as it sits there, [1404] it doesn't say that, but there are other suits on the same inventory at \$24.50, and the current purchases around that period indicate that is the current market value, \$24.50.”

Now, that is a principle of accounting with which some of you may be familiar. A conservative pricing of inventories, inventories are usually priced at their cost or at the prevailing market, whichever is the lower. That is the point Mr. Hellman is making. So we find in the record a statement by counsel that the \$24.50 price was a mistake. We find that reaffirmed by the defendant himself, and later in the trial we get what apparently the defense considered to be a more plausible explanation. It now is the cost or market, whichever is the lower. I think that is a good illustration of a showing up of the defense of putting the pieces together, to say, to put it that way, as we go along.

Six, the defendant did not include in the sworn statement which he submitted to the government Mrs. Betty Olender's bank account, and to that extent his net worth was understated. Mrs. Betty Olender's bank account appears in the stipulation at page 2 and shows a balance of \$5,000 as of the end of 1945 and \$10,070.06 as of the end of 1946.

Seven, the defendant made two investments in the Asturias Company. He only told Mr. Ringo about one of them. The second one he left off. Now the defendant's answer to that, [1405] anticipating to that extent, will probably be that he thought the Asturias stock was worthless. Certainly, ladies and gentlemen, if one \$5,000 investment in Asturias was worthless, then the second Asturias investment of \$5,000 was equally worthless.

Eight, Mr. Olender testified that he received gifts of \$5,000 a year which were put in the vault in Fresno by his father each year between the years 1930 and 1940, and he testified that the gifts were made to himself and his wife jointly. Mrs. Olender's affidavit, which is included in the official records of the Fresno County Department of Public Welfare, executed in May of 1939, which I read to you yesterday, establishes that as of that date she had practically nothing except a small monthly income of \$150 a month.

Nine, we just covered this point. Mr. Olender testified that he received \$2,500 from Mrs. Foote for a special purpose. He received it in 1945. The \$2,500 that he received in 1945 and put in his vault is not shown on Schedule 4, and, moreover, the records of the Fresno County Department of Public Welfare establish conclusively that Mrs. Foote never had \$2,500.

Ten, Mr. Olender testified that he received the Asturias stock against his will. Let me read that to you. It will just take a second. The defendant is testifying in response to questions asked of him

by Mr. Hagerty, and they are talking about the Asturias stock. Page 367: [1406]

“Q. Was it subsequently converted into an investment in the securities of that concern?

“A. I wouldn’t know. I didn’t get the stock until 1948.

“Q. Well, was it by and with your permission that this loan that you made to them was converted into an investment in their capital?

“A. It wasn’t with my permission, no.”

Now you remember he testified that he made a loan, that it was converted later, that he later got shares, and in exchange of that loan, and you will remember Mr. Horne who testified very early in the trial and stated that cash contributions made to corporations before the corporation commissioner authorizes the issuance of stock may be carried on the books as loans payable and later when the corporation commissioner’s permission is received to issue stock, they then issue the stock and adjust it, make an entry on the books reducing the loans payable and increasing capital stock issue, and that is what happened in this case.

As I have just read to you, the defendant testified that the stock which—that the conversion of the investment by way of the loan into capital stock was not with his permission. What does the record show? There is in evidence as U. S. Exhibit No. 17 the minutes of the Asturias Corporation. This is a meeting that was held on the 17th of February, 1947, and I [1407] read:

“On motion by Director Yabroff, seconded by

Milton H. Olender, the following resolution was unanimously adopted.

“Be it resolved the secretary of this corporation be, and he is hereby authorized to make application to the Commissioner of Corporations for the issuance of 3,000 shares of the capital stock of this corporation as follows:

“1,500 shares for cash to the following named persons:

“600 shares to Mildred Lane, 500 shares to Milton H. Olender, 400 shares to Roy Munson.”

And so on.

And so whereas the defendant testified on this trial that the loan was made, that the one which he made to the corporation was converted into shares without his permission, we find that he was the very person who seconded the motion made that that be done, as was just read.

I wonder if we might take a short recess, your Honor.

The Court: Take the morning recess, ladies and gentlemen. The same admonition to you.

(Short recess.)

Mr. Drewes: Now, ladies and gentlemen, the eleventh particular in which the defendant has contradicted himself. [1408] You will recall, I am sure, that I asked Mr. Olender in connection with the Barney transaction—there are in evidence the two checks, the two cashier’s checks with which the defendant paid for the Barney purchases—and I asked him if he knew from what source the money

had come for the purchase of those checks, and he said that he didn't. You will find the Barney transactions on your schedule 4. I believe they appear as deductions from—as a withdrawal from cash. The last withdrawal in 1944. And in response to questions asked of him later on in the trial by Mr. Shelton he said that it came from the vault and he was then confronted with his earlier testimony. Let me read from the record at page 833. Mr. Shelton is asking questions:

“Q. Is it your testimony that the cash to purchase those cashier's checks did or did not come out of your safe deposit box?

“A. To the best of my knowledge they came out of the safe deposit box.

“Q. Now, Mr. Olender, I will invite your attention to pages 619 and 620 of the transcript to the following testimony when you were on the stand:”

Question by me:

“ ‘Q. (By Mr. Drewes): With respect to these two checks which are defendant's Exhibit Z, one of them marked \$2,484.26, dated December, 1944, and one [1409] in the amount of \$1,911.77, dated November the 9th, 1944, Mr. Olender, is it your testimony that you purchased these at the bank? A. Yes, sir.

“ ‘Q. And how did you pay for them?

“ ‘A. With cash.

“ ‘Q. And from what sources did the cash come?

“ ‘A. I don't remember now, Mr. Drewes.

“ ‘Q. Do you have any record which would indicate the source? A. No.

“ ‘Q. The source of cash?

“ ‘A. I haven’t.

“ ‘Q. It was stated by your counsel in response to a question asked of him by the Court that this particular transaction was discovered by your accountants after the stipulation was entered into, is that correct?

“ ‘A. I believe so. I didn’t work with the accountants. They did all of the work.

“ ‘Q. You recall when?

“ ‘A. Oh, this last week—probably Sunday or Monday. Just the last few days.

“ ‘Q. Did your account ask from what source this cash came? [1410]

“ ‘A. I don’t remember.’ ”

So earlier in the trial he had no recollection from what source the cash came and he didn’t even remember whether or not his accountants had questioned him about it. He had no recollection of the Barney transaction at all as to the source of the cash, and lo and behold, it appears from the safe deposit vault and he later testified it came out of the safe deposit box.

No. 12. Mr. Olender testified that he had never done any auditing work. Let me read the record at page 425:

“ ‘Q. And you have testified, Mr. Olender, to a business concern owned by your uncle and your father which was operated by them in Fresno for a couple of years? A. Yes, sir.

“Q. Did you do any auditing work for that firm? A. No.

“Q. You worked for that firm, as you have testified, following your graduation?

“A. For a very short period.

“Q. Did you not ever do any auditing work?

“A. No, sir, not to my knowledge.

“Q. Did you do auditing work for a firm in which your mother had an interest?

“A. A firm that my mother had an interest in? [1411]

“Q. Or a business undertaking?

“A. Not auditing, no, sir. I never did any auditing in my life for anyone.”

The government then asked Mr. Olender if he had not executed an affidavit filed with the Bureau of Internal Revenue in connection with his probate of his father's estate and he said he had, and he was asked whether or not the affidavit, which is government's exhibit No. 67, did not include this statement:

“That in 1918 he was graduated from the University of California as an accountant and that he thereafter moved to Fresno and worked for his parents in the stores that they and his uncle, Samuel Olender, operated at 1520 and 1933 Tulare Street until about 1922. That as he was a trained accountant, from about 1918 thereafter he audited the books of said business, and he said that his affidavit did indeed contain those sworn facts.”

What was his answer to Mr. Hagerty's question:

“I didn’t read it. My sister prepared it and I didn’t read it.”

Thirteen. The defendant did not include on his return the profit enjoyed by him of something over \$2,000 as a capital gain on the sale of the Riverdale Ranch although in that year he did report and take in full a loss on the sale [1412] of what is called the Wilson Avenue property. His explanation, you will recall, that he did not understand the basis or he did not understand how to determine the cost basis of the Riverdale Ranch. He would have you believe that. But the record also shows by his own testimony that his primary work in connection with his father’s estate and the inheritance tax or estate tax return that was submitted in connection therewith had to do with the evaluation of real property included in the estate, of which the Riverdale Ranch was one. By his own testimony that is all he did in connection with his father’s estate, that he didn’t prepare the return, didn’t do anything else. But he did hold numerous conferences, the purpose of which was to determine the value of the real property of his father’s estate. The Riverdale Ranch is included in that estate tax return and the valuation subsequently put upon it of course appears in the return. The taxpayer need only subtract from his share of the proceeds received from the sale of the ranch his portion of the value as shown on the estate tax return.

As I stated a moment ago, I will repeat again, and I am sure the judge will instruct you, that if you believe that the defendant has testified falsely

in any material regard you may consider all of his testimony as false. I submit to you on this record, ladies and gentlemen, there is no other possible conclusion. [1413]

Now the defense has sought to establish quite apparently throughout the trial that this defendant knows very little about accounting matters. Many of these things undoubtedly will be explained in terms of ignorance on the part of the defendant, that he just didn't know what he should have done. Do you believe that, really? The record shows that he graduated from the University of California with honors, that he took accounting courses there, including an upper division course in accounting. His honor thesis was on something having to do with refunding bond interest on railroads, and I can think of few things more complicated or intricate. The record shows by his own testimony that he prepared his own tax returns. He prepared the returns for his wife, he prepared returns for his mother, he prepared returns for employees, he prepared returns for the Simmons. Let me just hold up for you, for your quick inspection, two of his returns prepared by him. Look at the painstaking detailed work on that return. Look how it is prepared. Look at the work on this return. Does that look like the work of a man that doesn't know what he is doing, who doesn't fully understand the intricacies, the ins and outs of the preparation of tax returns? That is a beautiful job. I wish mine looked like it. Is that man a man who is the victim of his own ignorance? Has he fumbled his way

into a bad situation? Or is he a clever man indeed who has known precisely what he has done [1414] every step of the way?

This man, the record shows, has carried on a great number of transactions entirely in cash. Schedule 4, unexplained withdrawals from the box. He would have you believe they total \$92,000. By his own testimony he never carries less than a thousand dollars, or, rather, didn't at that time, in cash in his pocket. Look at his personal bank account. This is the personal bank account. This happens to be January, 1944. There are three items. Take it at random: September '44, three items; March '45, three items. This is his personal bank account from which he pays his own bills, presumably. Here is October '45. What does your bank account look like when you get it at the end of the month? I don't enjoy a fraction of this man's income but I could fill a page. But this man has no charge accounts. Why? What's the purpose? To leave no record. There is no other answer. You and I, average citizens, don't conduct our affairs in this way. We don't go out of our way, which I am convinced the record shows this defendant did, to leave no trace behind him—even to the extent of his own personal monthly recurring obligations. Not only his transactions in sailor suits but his grocery bill—cash—no records. Are those the actions of a man who is forthright, whose life and personal conduct, personal transactions that he engages in from day to day, can stand the light of day? Or are they devious and hidden, [1415] purposely confused so

that no one can find out what he did or what happened?

The law requires, as His Honor will instruct you, that all taxpayers keep whatever records are necessary to determine their gross income, and if they are business men, including inventories and deductions to which they are entitled in order that tax may be assessed. This man did not do it. Why? What was his purpose? It may be that he didn't keep records for the purpose of hiding some other transactions which were in themselves wrong.

His Honor will instruct you that if you find that he had substantial unreported income for which there were no records and that he did so knowingly for the purpose of evading taxes, then the offense is committed, even though his purpose may also have been to cover up other wrongful acts.

Now it is a law, and rightfully so, and the judge will instruct you, that you must to convict find that the defendant is guilty beyond a reasonable doubt. That has always been English law and American law in criminal cases. As I say, rightfully so. But a reasonable doubt, as His Honor will instruct you, means just that. It is a doubt based on reason. It is not just a mere speculation or a conclusion: well, it may have been so, or a hunch. It is what it says. It is a doubt based on reason. It is the kind of a doubt, it is often said, that might arise in your own mind in deciding or determining [1416] some problem of your own, whether to buy a house or sell one, or send your child to this school or another,

or go on a vacation to this place rather than staying home and buying a refrigerator. It is a substantial reasonable doubt.

Now I submit to you, ladies and gentlemen, that if there is any doubt whatsoever as to the defendant's guilt in this particular case, it is not and cannot be a doubt which is based on reason, which has any relationship to reason, because the entire defense lacks logic. The entire defense—let me qualify that. I don't want to overreach. The greater part of the defense is based solely on the unsupported testimony of Mr. Olender.

The government's case, to the contrary, is supported by substantial evidence, in the form of documents, affidavits, bank records and the like.

I submit to you, ladies and gentlemen, that the defense in this case is a sham. It is so intricate it requires so many wild assumptions that it falls of its own weight. It is not worthy of belief. Ladies and gentlemen, you must convict. [1417]

* * *

October 10, 1952, 10:00 A.M.

The Clerk: United States vs. Olender on trial.

Mr. Hagerty: If your Honor please, by agreement with Government counsel we are going to try to limit our arguments. In other words, I am going to try to close within an hour or thereabouts. The Government will follow, with slightly less time than that.

The Court: I am not going to charge the jury late in the day, if that is your intention.

Mr. Hagerty: That is what I am asking. Would you charge the jury at two o'clock when they return after lunch?

The Court: It means they go out about three o'clock, late in the afternoon. You gentlemen told me yesterday you would consume the day in argument. I had planned to charge the jury Monday at 9:30.

Mr. Hagerty: It was our hope to get the case finished today.

The Court: Counsel, I am not going to send this jury out late in the day after four weeks of trial, unless the jury desires to come here Saturday morning, and it isn't my intention to bring them here Saturday morning.

Let us see how the day progresses.

Mr. Hagerty: I wouldn't want to limit my argument.

The Court: Counsel, I indicated to both you and Government [1473] counsel that there would be no limit on the arguments, that I consider the arguments helpful. They have been helpful to me. I am sure they have been helpful to the jury. I am not going to rush the case at this late stage. If it is early in the day and you want to close your argument early, that is a matter of your province. But I don't think either side should rush this case. It isn't fair to the jury, it isn't fair to the Court, after four weeks of trial, to rush into an afternoon, charge the jury abruptly late in the afternoon, send them out. It isn't fair. I have had too many jury

trials and I know the temperament of juries, as you do.

Mr. Hagerty: May I speak to counsel?

The Court: Certainly. If you conclude the arguments at noon time, I will charge the jury at one o'clock.

Mr. Hagerty: I think we could do that, your Honor.

The Court: All right.

Mr. Hagerty: Last evening as we were closing, ladies and gentlemen, I mentioned about the stipulation that had been entered into with and by Government counsel and ourselves in reference to the affidavit of Judge Monroe Friedman. That stipulation was entered into as a result of a phone call which was handled between Mr. Lewis and Mr. Drewes. I gathered from the stenographer in the office as to certain aspects of it. I knew that we had the judge under subpoena and of course I knew that this affidavit was not considered in the [1474] stipulation as to assets. It was worked out by Mr. Mytinger and Mr. Whiteside. So I assumed, of course, that the call was from Mr. Drewes asking us to stipulate and not call the judge. I understand that is not quite the fact. Mr. Drewes will explain it to you when he gets up.

I want to be fair in everything, fair in everything connected with this case. I want to deal only with what is on the record, on the record, and we have the affidavit entered into by stipulation. We did have the judge under subpoena. Ordinarily it is not necessary to subpoena a man of that type be-

cause each one will accept to his word. So that is what was ultimately entered into. His affidavit was admitted, as that would have been his testimony if he took the stand.

Yesterday I was explaining to you in connection with the testimony of Mr. Whiteside, some of the cross-examination of him by Mr. Lewis, where this transaction had come up, where the funds from the sale of suits from Leavy to Lerman resulted in \$5,000 that came back to Mr. Olender, which he then put into his firm. The criticism was made of his accounting methods as crediting that not to sales but to his investment account as new capital again put into the business. Great criticism was leveled at him by the Government because of that. But at page 206, at line 9, Mr. Lewis asked Mr. Whiteside this question:

“Q. But if it was not in the inventory and never [1475] put into the inventory previous to this time, and was sold and put in the store account, wouldn't it go into the investment account?”

“A. Well, if he is reinvesting money, it would go to the investment account, yes, sir.”

Great to-do has been made about the tremendous accounting ability of the defendant in the preparation of his own accounts and his income tax returns for himself and others. I show you the Government's Exhibits 5 and 6, which are the individual returns for the defendant for the year 1942—for himself and his wife, but he gives reference on the return, which is in evidence—you can see—“See the Navy Store return.” “See the Navy Store return.”

Well, if he is a sole proprietorship, he doesn't have to make out a return for the store. But he did make out a return for the store. He made out one for himself and another one, practically a duplicate, in his return for his store. Well, that is unnecessary. One familiar at all with income tax procedure knows it is unnecessary.

But in bringing you the returns in evidence, did they bring you both of them? No. They brought you only his individual return, on which he says, "See Army & Navy Store return." So this is actually an incomplete record. The Army & Navy return submitted in connection with this, should be attached to this or brought in as a schedule. And when the [1476] agent was brought here from the Government, he made some reference to the other return, but he didn't bring it.

Right there, ladies and gentlemen, punctures the great bubble that has been expanded into this man's knowledge of income tax and accounting procedure.

That is an eloquent example. And you may examine these in the jury room.

Now we have heard a great deal here about lost records. You will find, as I refer to some more of Mr. Whiteside's testimony, that he found the records in pretty good condition. So did Mr. Root. So did Mr. Ringo. But over this long period of time—we are addressing our attention now to the years '45 and '46—over this long period of time isn't it reasonable, isn't it to be expected that records would be lost? It's just a natural thing. A lot of records would be destroyed. And as a very good

example, I. Magnin & Company did not have their records for the period under inquiry; the Security National Bank, a banking institution, didn't have their records in connection with certain of these transactions that they brought into evidence; Money Back Smith Company didn't have their records that far back. Is it strange to find that a man who operates a store, which is a small store compared to any of the institutions I have mentioned, wouldn't have his records? Why, it's the most natural thing in the world. In addition to that, the witness Carroll—you [1477] remember the man who keeps records for the Bank of America, who came in two or three times—he didn't have some records that were requested. You recall that when he came here. He couldn't find certain records. Banking institutions, generally, above all places, watch their records and keep them.

Now you have been told time and time again that this is pure fabrication, this defense is fabrication, that Mr. Olender is not to be believed. Let's see what some of the men say about him who know him. Let's take a look at Volume 6, at page 282—start on page 281. Mr. Reinhard, the head of the Bank of America in Oakland, was on the stand, and on examination he was asked this question:

“Are you acquainted with the defendant Milton Olender? A. Yes.

“Q. About how long have you known him?

“A. Oh, for approximately 20 years.

“Q. Are you familiar with his reputation in the community over there?

“A. I believe I am, yes.

“Q. What would you say his reputation in the community for truth, honesty and integrity is?

“A. Well, in my opinion, good.”

Then there were objections. Further down the line, page 282, line 12: [1478]

“Q. His reputation is good, you say?

“A. In my opinion, very good, sir.”

Here is a man that has known him for twenty years, who has dealt with him in business all that time, makes loans to him in large amounts. What is his reputation? He trusts him. He would certainly trust him anywhere; his reputation is very good.

What does Mr. Lorenzen say about him? He has known him for many years, he is a man in business over there. Mr. Lorenzen in the same volume, at page 319, line 3:

“Q. Are you acquainted with the defendant, Milton Olender? A. I am.

“Q. How long have you known him?

“A. About twenty-five years.

“Q. Have you had occasion to do business with Mr. Olender? A. Yes, I have.

“Q. What would you say his reputation in that community over there for truth, honesty and integrity?

“A. I think it is the best.”

Now here are men with whom he has been dealing over a period of many, many years. These are

people with whom the Government investigators talked, checked and dealt with at some length of time. Yet they come in and tell you that this [1479] man is not worthy of belief. So by inference they are telling you that these men aren't either. And we know that gets to the ridiculous stage.

Now the Government has questioned the cash transactions the defendant had with the Money Back Smith store, because, you see, with those cash transactions, those goods being paid for in cash, as testified to by the defendant and by his bookkeeper who later made the correction after the end of the year to credit him for purchases made and reduce his liabilities, with the net result that his net worth at the beginning of the period would have been increased for the amount of those purchases, the Government questions it. But what did Mr. Lorenzen say at page 320 of the same volume:

“Q. And Mr. Olender bought these goods from you, did he? A. He did.

“Q. Do you know the method of payment for these goods?

“A. Well, he paid in cash most of the time for them.”

Now this is going back a long period of time. He is being questioned here about a transaction at least six years ago. The government had the opportunity to investigate these men, ask them these questions, but still they say: No, we won't believe you, we won't believe you. Those are men of [1480] standing in the community over there. Why is the Government jumping on this man, why, after this

number of years, and they have had this man under investigation since 1947—that is the inception of this thing, stemming out of the Goodman investigation—why haven't they brought this case to trial long since, when records were available, when Goodman was well, when they could have produced a case in court—maybe, if they had one? The reason? Why, it is because they never felt that they had a case against this man, but in the past year or so a lot of officials—maybe not a lot—we hear a lot more than actually existed—in the Bureau of Internal Revenue have been tagged off base, some of them resulting in criminal indictments and some of them being sentenced. Immediately word went out: Prosecute every file we have got in the house. And that's what this is.

Mr. Drewes, Mr. Whiteside, Mr. Root, they are not men—I don't think they are men who would knowingly fight to convict an innocent man. Of course when you are working in a field like that, you come to have a fixation of mind. It's pretty easy for you to believe, when you are doing it all the time, nothing else but prosecuting a man or chasing a man down, to think, well, there is something there even if I can't find it, he is guilty even if I can't find it. It gets to be a mental fixation. It's pretty easy for them to think and fall in the pathway of their life's thought. But still [1481] I don't think they would prosecute a man if they really felt he was innocent. But, as I say, it is easy for them to feel that a man is guilty, because that's their business, that's their business, and say: Well,

maybe I don't quite see it, but I know he must be guilty.

Well, that isn't evidence for a court. Suspicion isn't evidence in a court and suspicion can't support a verdict. There has to be evidence brought to you in the form of documents or word of mouth here under oath in this court.

But when the axe fell in Washington and chopped off some big tails, immediately the order went out and these fellows don't have the discretionary power to stop this thing. If Mr. Drewes would rise up in this court and say, "Well, after all, this evidence is in, so what, I don't think I have got a case, and I will join the defense counsel in a motion for dismissal." The newspapers would seize him and tar and feather him in every headline in the country, and say, "Whitewash an income tax case." They can't do it. If he sends a memorandum to the Attorney General's office that this case should be dropped, they will say: It's too hot for us to handle. Let the people handle it. Once the wheel starts turning, you are just in the machine, that's all, and the only way to stop it, ladies and gentlemen, the only way to stop it, is for a group of citizens, like you, to just put your foot down. When a case comes up like this, with a man that they don't have any [1482] evidence on, or the evidence they have produced is very equivocal, shot through with doubt, come to a speedy verdict of acquittal.

You can see there is doubt all through this thing, doubts everywhere you look. This man is not charged, as so many of these cases you have read

about in the headlines, he is not charged with bribing an official to backdate an income tax return. He is not charged with that. He is not charged with bribing an official to fraudulently cut down his tax. Nothing like that. They simply say he did not state all his income, and they start out with the wrong premise. They do not give him credit for the actual wealth he had at the inception of the period. If you start out with the wrong reasoning, you can never get a correct result.

It is a trick formula, but you will always be wrong. They haven't given him credit for the money in the Goodman purchase, of which they have produced in evidence the checks with the dates as to when the checks were bought. There's \$20,000 right there. They haven't given him credit for that. They haven't given him credit for these purchases that were made in cash and were incorrectly charged to his accounts payable, which would increase his liabilities for the period. That's the Barney and the Smith transactions. They didn't give him credit for the \$1,000 check he had in his pocket which had not been cashed. They didn't give him credit [1483] for the gifts he had received. But at the end of the year, for a transaction just about as big as the Goodman transaction, the \$20,000 worth of bonds of his mother, they charge him with it, they say that he bought those during the period when they knew he didn't. They investigated that. They talked to the mother, and if her lips weren't sealed in the grave and she could come here, you would hear the story. But we can't intro-

duce her letters—the rules of exclusion of our laws of evidence—we can't introduce her letters.

You recall when the men were on the stand, the men from the bank, and Mr. Whiteside, and we said: You investigated this case, you knew her signature. Can you identify her handwriting? But they couldn't identify her handwriting. Mr. Whiteside said—he may have seen a lot of it, I don't know—but he said, "Well, I only saw her signature card at the bank." But he talked with her. He spent two evenings talking to her. He discussed her affairs. Don't you think he asked her about those bonds, don't you? The \$20,000—the Goodman transaction only exceeds it by \$500. Don't you think he talked about it, and at some length? I will get to his testimony in a minute and see what he said about it. But I think he did talk to her about it and she told him that they were her bonds, not Milton's, but she had given him the interest on the bonds which he reported on one of his returns. She had reported it the year before and subsequently, when Mr. Ringo made the [1484] following year's income tax return for the defendant, he reported it properly. Mr. Ringo did—that is, the man—the owner of the bonds, must report the interest.

So, ladies and gentlemen, I think there is doubt all the way through this thing. It just doesn't stand up to the acid test of reason and, as I explained to you, why. You know that when the scandal started in Washington, immediately these income tax trials started out in prominence, as they call it. And why? The politically smart and adept men in

Washington knew the best way to take the fire and heat off themselves was to throw it out into the field, and that is why we are here, taking the heat off Washington. Had the Government taken into consideration the Goodman transaction, the cash in box—they only gave credit for \$50,000—if they gave him credit for \$75,000, that would be another \$25,000, and then these gifts that I spoke of, and reduced his wealth at the end of the period where they have put in the mother's bonds, our figures would be in practical agreement, and, as I pointed out to you before, these net worth approaches are not exact, they are only an approximation. It's like a slide rule, it gives you a quick answer. It gives you an approximation. It is not an accurate picture. But have they given him the proper credit for the things he had and not charged him with the things that were his mother's, there would have been no dispute here. [1485]

This is without a question of doubt one of the weakest net worth cases I have ever seen, the weakest, I should say, and the answer is political.

Now, Mr. Drewes said that the defendant was false in telling you that he wasn't an auditor, and then points as proof of that that he worked and assisted his sister in his father's estate in getting the valuation reduced of the properties, the Riverdale Ranch and the other properties that were in that estate, getting them reduced, fighting with the inheritance tax appraisers as to the value of those properties. Well, again, we are back on the subject of tax avoidance. The valuation of property from

the average person's idea is the value of a thing which you pay for generally, and they had bought these properties years before at a lesser amount. So it is an argument when you go to these appraisers as to whether the weight of times and people and changes of circumstance have increased these values. Well, everybody has got a right to be heard, and he just simply had gone and talked to this inheritance tax man and kept harping that they were uprating the property too high. What in the world has that got to do—what in the world has that got to do with the interpretation of a most abstract section of the income tax law? The evaluation of properties received through inheritance and death, that section was read to you by Mr. Mytinger, out of the Code sections, the law book, at Mr. Lewis' request. [1486] It is a lengthy involved bit of internal revenue law. I don't want to take up the time reading it to you now. But I think you will recall that long section that Mr. Mytinger read, and I doubt if the average person can interpret it, let alone a lawyer. The law books are filled with cases involving it. So I think in that respect Mr. Drewes' argument and attempt at impeachment is absolutely silly. There is no comparison. The fact that he could go down and talk to a man and say: You are putting too much value on this piece of property that belongs to my father's estate, the fact that he could do that, that he ought to be able to interpret a very involved Code section, it's just nonsense, it doesn't make sense. It's just like their whole case, like starting out with the wrong figures

in a net worth case, it just doesn't make sense. It's like one of these silly syllogisms like you would say all Russians are men, all Russians are Communists. Therefore, all men are Communists. It just doesn't follow. If you start out with the wrong basis, the wrong premise, you are going to end up with the wrong answer.

Now Mr. Drewes spent several days questioning Mr. Hellman on the stand, and to each point in our schedules he would say: Did you verify this, did you verify this? Well, Mr. Hellman came into the case just shortly before trial, relatively speaking. How could he verify any of these things other than the records that were in existence? He [1487] couldn't go to the cash box. It had long since gone. The money is gone. How could he verify anything like that? He knew that. That was only window dressing for you. And when we attempted to do it to Mr. Mytinger, you remember he said: I didn't verify this—and the same thing goes for the entire record: I verified nothing.

But they can blow up these beautiful bubbles or these involved statistical treatises for you based upon the premise that is given to them at first, the assumption, if you assume this, then it is logic. But if you start out with a twisted basis, you can't build a straight house unless you make a lot of adjustments.

Another thing that flies right into the teeth of their argument. They say the defendant here is one of the smartest men, and this and that, he is not to be trusted, he is tricky, he is clever and

dodging and ducking, and so forth. He bought—by their own record—it is in evidence—approximately \$58,000 of United States Government bonds from the United States Treasury, of which the Bureau of Internal Revenue is a subdivision. If he was so smart with illegally obtained money, would he go right to them and buy bonds from them? Everything could be traced, identified positively as to time, point and everything else. It doesn't make sense. It doesn't make sense.

Cross-examination of Mr. Whiteside, page 1170, I believe, [1488] referring to the examination of the invoices that was made on the day we didn't come to court, that morning by Mr. Hellman, Mr. Root and Mr. Whiteside, here in this court, the question was asked Mr. Whiteside:

“Q. Didn't you state at that time that inasmuch as 1944 was proved correct it was deemed unnecessary to verify 1945 and 1946?”

“A. That was one of the factors considered. The main factor, I would say, was the time of day. It would have taken several more hours to check those out.”

Now, do you think an experienced investigator is going to let a matter of a few hours (we have been at trial a month) on a day that we were off, like that, hold him up if he thought he had some evidence that he could really produce in this Court? Why, of course not. He found the records all right. So he decided a search was fruitless, useless, so he did not continue it for 1945 and 1946. The records

were proper for 1944, so he knew he couldn't start anything.

On page 1233 of Volume 16—I told you that Mr. Carroll testified that he couldn't find certain records—line 12, page 1233:

“Q. Will you state whether or not you were able to locate an application for that cashier's check?”

You remember the first cashier's checks they were asking [1489] about, the applications made by the defendant for them.

“A. I was not successful.”

The Bank of America couldn't find that record.

The lost records of the Security Bank, page 987, Mr. Gahura, the man from Fresno—989, I guess it is—in reference to a \$2,500 withdrawal from that Fresno bank. Mr. Drewes is examining Mr. Gahura. He says:

“Q. Can you state what the ultimate disposition of that sum of \$2,500 was? A. No, I cannot.

“Q. And why can't you?

“A. The records were mislaid or lost. We are unable to find them.”

Mr. Whiteside's testimony, page 1179. The question was asked him:

“Q. Didn't Mrs. Olender tell you during the course of your investigation that \$20,000 worth of bonds belonged to her?

“A. I don't believe we asked her that question. I don't recall.”

Now, ladies and gentlemen, there is a transaction that is nearly the same size as the Goodman suit

transaction. \$20,000. The chief investigator on this case makes a special trip with an assistant to Fresno to see this woman and to check her record and doesn't recall asking her about the [1490] second biggest single transaction in this entire case. Is that reasonable? Of course it isn't. And if he had asked her, don't you think he would have remembered? Why, sure he would. But he says, "I don't recall."

"Q. You did not ask her that question. That is one of the largest items in this case.

"A. I don't recall that particular point, Mr. Lewis."

It burns you up sometimes. Now we are the side that is charged with fabrication. Don't you know that if that woman had said, "Yes, those are Milt's bonds. He has had them for years. I gave him the money a long time ago. But he has had them for years. But he made the money this year and bought them at my suggestion." Don't you know that his mind would have been crystal clear on that subject? There would have been the point he wanted.

There is a rule of law, I am sure His Honor will give it to you, that in regarding evidence you are not only to consider it for its own intrinsic worth but as to the type and quality of evidence that was within the party to produce, and when secondary and less value or weaker evidence is produced, when stronger might have been produced, you are entitled to distrust it entirely.

Now don't you know in his mind, if he were really working on this case, and I think he was,

don't you think his mind [1491] would be crystal clear on that transaction? Why, of course it would. And don't you know that after his interview with Mrs. Olender he must have gone back and followed his usual custom of sitting down and writing out his notes, because he knew the day would come when he would have to testify under oath on the witness stand as to what occurred at that interview.

He is here to win a case, not to lose one, and he is on that team. Not ours. So he will not be patted on the back for putting anything into evidence, that will aid us.

But here we are, ladies and gentlemen, for the furtherance of justice. We are here for the perpetuation of the American idea of liberty, which concerns us all, each and every one of us, and I am sure that you will feel the same way as I do about a statement like that.

Mr. Lewis says: "You can't remember asking her that question? Here, according to your own figures, you come out with \$73,000 of unreported—what you claimed to be unreported income, and during the course of your investigation you didn't ask Mrs. Olender about the \$20,000 worth of bonds?"

"A. I say we may have asked her. I don't recall at this time."

Is there any doubt about it in his mind about similar events at or about the same period of time involving much less, [1492] much lesser details, things of much lesser significance? Not at all. He is sharp. He can tell you the very day he started on this case and what he did.

Now we ask him another question:

“Q. Have you examined all the records in the bank concerning Mrs. Olender? Didn't you?”

“A. Yes, sir.

“Q. Are you able to identify her handwriting?”

“A. No, sir, not just from a signature card. That would be the only handwriting in the bank.”

Then on page 1181:

“Q. (By Mr. Lewis): Did you or did you not talk to Mrs. Mollie Olender about those \$20,000 bonds?”

“A. Well, my answer that I gave you a few minutes ago, I stated I did not recall talking to her about those particular bonds. I may have. We talked to her two evenings and we covered many subjects.”

It's the most important subject he could have covered, the biggest single item.

I will let you evaluate that, ladies and gentlemen.

You remember a little girl, Mrs. Manger, the bookkeeper from the defendant's establishment. She used to be his employee. She formerly had been the employee of Dorfman and a part-time employee of the defendant. Do you recall she [1493] had never been even questioned by the Government before? The first time they ever interviewed her apparently, other than when Mr. Root saw her in his first investigation in the office—but he didn't question her in reference to any of the books—but the first time they ever had seen her was when she took the stand here. Don't you think that if you are going to investigate a man's business on a net worth basis

and you were finding great criticism in your own mind with his bookkeeping system that you would have gone to see his bookkeeper? She was the lady that made the entries covering the Money Back Smith transaction and the Barney transaction, and she explained it to you from the stand. She said that she—she gave you her routine of the operation, how she would write the checks for the invoices that were made up, and when she had these checks to go out for these transactions Mr. Olender told her that he forgot to tell her that he paid cash for these items, and she made a journal entry in the books to change it and credit her account and charge off the accounts payable. Do you recall that? That's in the record here. I won't take the time now to read that to you because we are fighting time. I would like to see that you are able to finish this case today. But that's the evidence here. And don't you think, isn't it a reasonable assumption to make that if you are going to question a man's business, if you are questioning him on a net worth basis like this that [1494] you would proceed to inquire of the people who knew the most about that business, what they had done in connection with some of these entries? It's perfectly logical. But they never did.

And the other lady, Miss Busby, who took over the books after Mrs. Manger. She saw the investigators only once. But that's not permitted into the record here because it wasn't to do with the investigation here. So it was inadmissible. So I can't tell you about that.

I told you about the lost records of I. Magnin. Mr. Cahn, the credit manager, appeared here in answer to a subpoena by Mr. Drewes. Mr. Drewes questioned him on page 43 of Volume 2, line 16.

“Q. Mr. Cahn, you have appeared here in response to a subpoena duces tecum. You were asked to bring with you the records of I. Magnin & Company with respect to the accounts of Milton Olender and/or his wife, Mrs. Betty Olender, for the years 1945 and 1946. Have you brought those records with you? A. No, sir.

“Q. Why not?

“A. We don't have them any longer.”

You know, if you and I were injured in a bus crash or something like that, if we didn't file suit for our injuries [1495] within a year we would be out. There are statutes of limitations, and the policy of the law is that stale quarrels shall not be encouraged; bring your case to court when we can have all the people who know about it and all the records are available. The Government didn't do it here. And they had the opportunity.

We heard a great deal of accounting practices here and criticism has been levelled at the defendant in reference to his pricing of the Goodman suits when they were taken into the inventory, which you will find on these sheets, and he is criticized for putting them on the sheets for \$24.50 instead of \$25. Undoubtedly that was an accounting principle based on the soundest and most conservative practices, placing those suits on the books at whichever is lower, cost or market, to more cor-

rectly explain your position and your inventory. Everybody after the war and along toward 1945 into 1946, everyone anticipated a let-down, a depression. Consequently everybody got ready for it, in smaller businesses and larger businesses alike. He is marking down his inventory to cost or market, whichever is lower.

These exhibits, you can examine in the jury room.

He was criticized for being indefinite as to where the funds came from with which he made the Money Back Smith purchases. Well, the accountant took it for granted under the man's statement that if the money didn't come from the [1496] sources he named, his business, the income from rents and gifts from the mother and such, that it came out of the box. Our accountant deducted it from the box. If the Government criticizes that on the man's testimony, it increases the money we have in the box at the end of the period on Schedule 4 at December 31.

That Money Back Smith transaction, a withdrawal of \$2,160.03, that is this figure here, if the Government wants to criticize that, we are operating on a conservative basis. We charge it out of the box. If they say it didn't come out of the box, it increases the money we have on hand and benefits us. But they don't want that to happen. They say, no, we won't give him credit for that. We will give credit for the Barney transaction, which reverses our position, which funds didn't come out of the box.

There is a method to this madness, ladies and

gentlemen, and you can follow it in their theory.

Now, as I said before, this is a circumstantial evidence case. All these net worth cases are circumstantial evidence. Circumstantial evidence, as His Honor will instruct you, is the type of evidence that in order to support a verdict in favor of the Government, counsel must not only be consistent with the theory of guilt but absolutely unexplainably inconsistent with any other reasonable theory. If there is any rational explanation in any way of it, circumstantial evidence [1497] will not stand up because there is then reasonable doubt. And I tell you, and I say it advisedly, that this is shot through with reasonable doubt.

Does your Honor want to take the recess?

The Court: I didn't notice the time. We might take a short recess, ladies and gentlemen, with the same admonition to you.

(Short recess taken.)

Mr. Hagerty: May it please the Court, ladies and gentlemen, Government counsel, and colleagues. I will try to close very rapidly.

The charge was hurled at the defendant that you couldn't see the breakdown of the Government interest on the bonds on this return or in some of the returns—this is the return for Mrs. J. Olender—you couldn't see the breakdown of the bonds on it. It is very simple, ladies and gentlemen. You can examine this thing in the jury room. You can see it marked right there.

Another thing, we have had the loss of records

discussed many times—where are they? The most interesting one to my mind is the contrast between defendant's Exhibit P, which is the partnership return for 1946 out of the Fresno property, wherein he has enclosed the schedule showing the loss on the sale of the Riverdale Ranch. Here is the schedule. I have these things clipped together so you can contrast them, because [1498] here is the Government's record. They don't have the schedule. It is not attached. But if you will look closely at this thing you will see that at one time something was stapled here. There is a staple mark right through there. Isn't it reasonable to assume that this schedule had been stapled to it and the Government has lost it? Their record is incomplete. Here is a copy of the defendant's return with his schedules attached. You will remember a great to-do was made about it at the time, it couldn't be so, couldn't be. But if you examine their own return, you will see. I think of the millions of returns they had over there, they must have lost a certain number of them, and this schedule was attached thereto. You can observe it for yourself. The staple mark is right through the center. I think they have lost it.

Great store has been set beside the pension, the old age pension that was granted to Mrs. Foote. Mrs. Foote was not any blood relative of this defendant. He has told you that his wife didn't tell him anything about any affidavit that she signed. And I can well believe that. One of the great problems of the modern family, particularly of the working people, those people in the ordinary cir-

cumstances, is taking care of disabled or elderly people. Now don't you think that because of your common observance—you are entitled to draw on your own experience in some respects so long as you use reason—Simply because you are passing behind [1499] this gate doesn't mean you are to leave outside your common sense. Your common sense will carry you through a lot of these tricky and technical attempts to blind you. Isn't it true, and you have noticed, that many a time a husband and wife, either the husband or the wife, will have a relative that needs help; and unbeknown to the other spouse help will be given. Mr. Olender said he didn't know anything about any aid—any affidavit his wife had signed. Mrs. Widrin was here on the stand. She is one of the daughters. They could have asked her if they wanted to bring that out in the first person to you. They could have asked her certain things in that connection. She was one of those who signed an affidavit. No attempt was made to. But you will note that as of the date of February 23, 1943, that the old age pension or help was discontinued, and it was at the request of her daughters Ella Widrin and Betty Olender. They told their mother that they would assume full responsibility of her in the future. Therefore she wanted her old age—assistance, I guess they call it—discontinued. Look at that in this record.

Now that is before any of the time that this man is charged with income tax evasion or by inference they attempt to smear him with this thing. This

is in 1943, early 1943. And in looking through his books, as I pointed out to you yesterday, there's many a check out of his business made to Mrs. Foote. [1500]

Now, there was another attack made on their own witness, Mr. Ringo, Mr. Ringo that they set great store in him, like the Rock of Gibraltar, on that \$50,000 indicated as the cash box proceeds in his preliminary statement. They say we must stand by that. That is the basis of their whole suit. But you see how quickly they challenge and say he isn't telling you the truth when he told you he went to the security box with Mr. Olender and examined the contents and found the mother's bonds in an envelope marked "Mother's bonds." They attack him there. But he is their witness. They vouch for his honesty and integrity—but only want the things they want—no matter what witness produces them.

Think of our witnesses. We brought in the little fellow Terrana, the tailor. He told you the situation in reference to the suits and the adjustments and the tailoring, and so forth, that Mr. Olender couldn't have a tailor, didn't have a tailor shop at the time of this inquiry, and couldn't have a tailor shop under the present restrictions of his lease. Nor could the tailor sell suits under the present restrictions of the lease. They bore out everything for us, and the ring of sincerity in this story. And you just think, Mr. Olender was on the stand for four days, and under the best cross-examiner probably in the United States Attorney's office, Mr. Drewes,

trying to dig and pick [1501] and dig at transactions that occurred up to—well, all the way back to '42. Just think, how would you react sitting on the stand, could you recall all the details of the transactions you have been through in that period of years? And just to show that none of us are infallible, I could point out to you in one of these transcripts the statement of Mr. Shelton, who has lived with this case a long time. He is the Government counsel who has brought this thing to the United States Attorney's office for prosecution. When Mr. Hellman was on the stand I asked him in connection with one of the TCR's. I said—I asked him and showed him a notation that was written on it and Mr. Shelton said: "Gee, is that on there? Is that there? Where is that in one of the exhibits?"

That was in one of his own exhibits. He didn't know that representation was on it. That is just to show—not to criticize him, but just to show the fallibility of the human memory. A moment ago when I was talking about that credit on that schedule I misstated and called it the Smith transaction instead of the Barney transaction. In my mind they both tie together because of that general entry that credited them on the books on the accounts payable, made by Mrs. Manger, the journal entry made by her to credit him for an overstatement of his liabilities.

Now, ladies and gentlemen, I am about to close here. [1502] You will soon, after Mr. Drewes finishes, have this case to consider. I think it is shot through with reasonable doubt. There's doubts

about everything. The method in which the Government started, the method used is wrong. I have pointed out to you that they haven't given him credit for the \$25,000 that was in the box. They have stipulated to Monroe Friedman's—Judge Friedman's affidavit being admitted in evidence. But they have not taken into consideration the amount of money that he said was in there in their calculations. They admit the affidavit but they will not give credit to the contents of the affidavit. They will not give him credit for the Goodman sales, the purchase of the Goodman suits preceding this count of money. They wouldn't give him credit for the Money Back Smith transactions. They didn't want to give him credit, but finally yielded it, when it became so obvious, on the \$1,000 check.

The thing levels itself out into the same general picture, and there is no evidence here of a substantial understatement of income. And then over and above that, there is no evidence of a specific intent to evade the income tax laws of the United States, to violate those laws.

I am sure that you all will be true to your oaths as jurors to follow his Honor's instructions as he gives them to you, to apply them to this case. I am sure that you will all have the courage of your own convictions, that if you [1503] arrive at the conclusion which I think is inescapable, that there is no evidence here beyond a reasonable doubt to support this charge, the material charges made by the Government, that you will return a verdict of acquittal for this defendant; that if you feel in your own

mind that you are right, that you will stay with that opinion as long as you think you are right, and that as long as you think you are right you will stay with that opinion even though others may disagree with you. And you have that right. That is your guarantee. That is one of the supreme tenets of American citizenship. As I said earlier, for that time you are like a king—you are king for a day, because you can decide, and no one, like his Honor, wouldn't attempt to—but he couldn't if he wanted to—nor could anyone else in this world—force you to change your mind, so long as you thought you were right in the conclusion you have drawn on the evidence, and I don't think that under the circumstances that you can find evidence here to support the charges made by the Government. I think that they are shot full of doubt, reasonable doubt, and that the only verdict that could be returned properly would be a verdict of acquittal.

Excuse me.

The defendant as I said was on the stand and testified to these things. He was under strain for four days. It is [1504] an ordeal to go through that. His memory, there may have been some doubt in his memory on some things, but I think that all in all they were reasonable and truthful answers, and the errors, if any, were of a minor degree.

Mr. Whiteside is a professional witness. He is a man whose business is developing facts to be revealed on the stand under cross-examination, and he had to fall behind the cloak of "I don't remember, I don't recall." If he would do it, how much

more would we expect to come from the average individual? And this defendant is not a criminal. He has been in business over there for many, many years, and will be the rest of his life.

Mr. Olender is not a criminal that should be seized upon, as he has been in this case, liens placed against everything he owns, and he should not be put into this position. He is a citizen. This Government isn't at war on its citizens, or shouldn't be.

And, ladies and gentlemen, in closing, I would say this, you have taken your oaths as jurors. We spent considerable time in helping to select you, ten times as long as the Government did because we wanted people like you. And in parting, I leave you with this thought: The father Polonius in Hamlet, when his son Laertes was going away overseas, said, in giving him the advice that a father would to a son starting out into the world, "This above all, to thine [1505] own self be true and thou thence canst not be false to any man."

And I leave you with that thought, secure in the belief that when you return to the jury room you will come to a speedy verdict of acquittal, because this evidence is just shot through with reasonable doubt.

Mr. Drewes: It is my duty now to close.

Although it happens often, it is not easy for my colleagues or myself to sit here in a courtroom hour after hour and hear it said to us, either directly or by implication, that in a criminal trial we suppress evidence, falsify in our arguments, fail to produce documents. There is a saying, however,

among attorneys in the profession who are engaged frequently in criminal work that if you have a weak case try the agents.

I didn't realize myself, until Mr. Hagerty was well into the argument, just how weak the defense is. What are the three big issues in this case?

1, shall you credit the defendant with \$72,000 rather than \$50,000 in his beginning net worth?

2, shall you credit him with \$20,550 as the value of the Goodman suits on hand in the beginning net worth?

3, who owned the \$20,000 in bonds?

Those are the three big issues.

What part of Mr. Hagerty's argument was devoted to a [1506] considered exposition of the issues involved in those three things? Very, very little. Rather he gathered from the record a number of immaterial, inconsequential matters and expounded on them for the first hour, hour and a half of his argument. He pointed out to you that whereas the accountant Mr. Horn had testified that he had never made an audit, in truth and in fact he had filed an affidavit in which he said, some time in '47 or '48—I forget the date—"The Asturias Company was bankrupt." Well, so what? There is no contradiction there. It is completely immaterial. The word "audit" has a very real meaning in accounting terminology and in that profession. It is perfectly proper to come to a determination that a company is bankrupt without ever having made an audit. Where is the contradiction? And who cares anyway?

Then he took up the matter of the Asturias stock. He went into that at great length. The promissory note. What difference does that make? This is a net worth case. If the defendant purchased \$10,000 in Asturias stock in a given year, then he has that much income, and that's the issue and that's the point. And whether or not it was first considered as a loan, which was carefully explained to you, and is in accordance with the facts, no corporation in California may issue any stock without permission of the Corporation Commissioner. Directors and officers and promoters, [1507] if that is what they be, often are unwilling to wait the necessary time to begin operations and are unwilling to wait for the Corporation Commissioner to grant his permission, and so they accept the money and choose to treat it on their books as a loan rather than as a purchase of stock, and as soon as the permission is granted by the Corporation Commissioner then they issue the stock and cancel the loans, and that is all there is to it. The fact that Mr. Olender was given a promissory note as paper evidence of his capital contribution paying the issuance of shares which would be substituted therefor, is highly immaterial and irrelevant, and nobody pays any attention to it. To say nothing of the fact that Mr. Olender included \$5,000 worth of his Asturias stock and concealed the other \$5,000, and if he makes any contention that the stock was worthless, then it was all worthless, and the record of course shows conclusively that the corporation got into difficulties and was suspended or suspended operations in 1947 or

1948. I have forgotten which—but after the period with which we are here considering.

Mr. Hagerty stated that Mr. Olender had forgotten about the Goodman transactions, but Mr. Olender himself, by his own testimony, went to the Bank of America and purchased nine cashier checks and he remembered it sufficiently not to put it in his books. And in July of 1947, as you [1508] have in the record, he told Mr. Blanchard that he had no recollection of any such transactions, other than the \$1380 transaction which came later, and that was in his books. And in January or early in 1948 he again told Mr. Root that he knew nothing about it, although he had previously, several months before, been questioned by Mr. Blanchard, and Mr. Ringo, himself, as he testified, was unable to state now if that particular transaction or got the facts.

Mr. Hagerty has stated to you that we have not given the taxpayer credit for the \$70,000 plus, and that is all it says, "Over \$70,000," which is attested to in Judge Friedman's affidavit. He very studiously avoids telling you or referring to the fact that that affidavit states that the money was counted in Judge Friedman's presence in April of 1944, a full seven months plus before December 31, 1944. He did have the money in April—as I stated to you, in April—we accept that. But how much did he have in December 31, 1944? That's the issue. And we have given him credit for the amount he told his own accountant, Mr. Ringo, that he had.

Do you have Schedule 4 still with you? Will you note in Schedule 4 that there are a number of with-

drawals in 1944. My colleagues have calculated for me that between the beginning date of that schedule and the end of the year the withdrawals included thereon exceed over \$13,000. That would, right there in itself, account for the greater part of the [1509] difference between the \$70,000 plus and the \$50,000 by his own calculations. Those calculations for the most part, as you recall, are unexplained transfers to his personal account.

Mr. Hagerty makes a great deal over this pass-book of the Bank of America, the Fresno Branch, December 26th, 1941, \$3,000. That is all there is on it. Why, says Mr. Hagerty, didn't we take this into consideration? Why should we? What difference does it make? The taxpayer's own submitted net worth is dated December 31, 1941, and our starting point is December 31, 1944. This particular deposit from wherever it might have come, long antedates any of the matters with which we are here concerned. And, what is more important, the only gifts which the taxpayer on this trial, or to the best of my knowledge at any time ever claimed, were the ones which he testified to here, the earliest being February 3, 1942, in the amount of \$1,000. What, I ask you, does this bank account have to do with anything concerning us in this trial? Nothing.

Mr. Hagerty said with respect to Betty Olender's affidavit: There is nothing in this record to show that she knew anything about those gifts, and her affidavit, you recall, shows that she has practically no property at all as of 1939. Answer this question: Who knows whether Betty Olender knew about

those gifts? Who could testify? If there [1510] is any question about it, Mrs. Olender might so testify.

Mr. Hagerty: If your Honor please, I think that is improper argument. He is asking the jury to speculate about things that are not in evidence. He could have produced any evidence he wished on that score.

The Court: Well, the inferences may be drawn from any of the facts in evidence, if there be any. The jurors may reject the arguments of counsel, if there be no evidence to support it in the minds of the jurors. Counsel on both sides, as I have indicated, are entitled to argue the matter from their viewpoint, and, if you reject the argument, all very well and good.

You may proceed.

Mr. Drewes: Did Mr. Olender take the stand in rebuttal to testify as to whether or not he had ever told his wife anything about the gifts? He didn't. Who was the other person who might have testified—Mrs. Olender. Did the defense call her and question her as to her knowledge of the alleged \$5,000 in annual gifts? They did not. Could we call her? No. Because you all know that a wife is privileged and need not be compelled to testify against her husband. We could not call her. The defense could and saw fit, for reasons of their own, not to do so.

That leads me into the question posed by the defense as to why Goodman wasn't called. The file on this case will [1511] show that on September 10,

a subpoena was issued directing Goodman, who is now in Miami Beach, Florida, to appear. Nothing was heard till a letter to which Mr. Hagerty referred was received. The letter is dated September 12 and is stamped as having been received in the office of the United States Attorney on September 16. I am going to read it to you. It is very short:

“Chauncey Tramutolo,
“U. S. Attorney,
“San Francisco, California.

“Dear Sir:

“Mr. George Goodman is suffering with chronic asthma, and at the present time is experiencing an attack of asthmatic bronchitis precipitated by a virus infection. For the past several months he has required many injections of adrenalin, frequently given in emergency at Mt. Sinai Hospital.

“For these reasons he has been advised not to subject himself to further physical exertion, emotional stress and strain, or change in climate.”

That is signed by Jesse O. Halperin, M.D., and the address is given.

The processes of this Court, ladies and gentlemen, are open to all parties. The defendant may go to the Clerk's office and get subpoenas, turn them over to the Marshal for [1512] service, just as readily can the prosecution. Mr. Goodman could have been brought here by the defense just as readily as by us, and they would have experienced whatever difficulties we experienced.

Mr. Hagerty in his closing argument stated that

to the extent that we acknowledged that as of 1945 the \$7,000 held by Mr. Saraga for Mr. Olender should be added to the net worth of that year, and that to that extent we acknowledged the Goodman transaction. We most certainly did not. I am sure you understand that. We insist in our position that the Goodman transaction, the Saraga transaction, the Lerman transaction, have no connection whatsoever. Mr. Saraga was holding \$7,000 of money which apparently belonged to Mr. Olender. To that extent it was an asset of Mr. Olender and for that purpose should be included in the net worth of that year. Where the money came from originally, what the transaction was, we don't know.

Mr. Hagerty: If your Honor please——

Mr. Drewes: But it was no part——

Mr. Hagerty: I will object. His own witness, Mr. Leavy, said that that money was given to Mr. Saraga by him from proceeds of the transaction of the sale of Goodman suits. That is his own witness' testimony.

Mr. Drewes: It is not my recollection that he said, "Goodman suits," counsel. He just said he sold the suits. [1513]

Mr. Hagerty: Sold suits and took the proceeds east for Mr. Saraga to buy—to send further suits to the defendant.

Mr. Drewes: Be that as it may, counsel has urged upon you a rather amazing concept of the Lerman transaction. He showed you the checks. Here they are. He said: Look at the record, and then he said the bank records are public records.

Well, that's a new one to me. If any of you ever try to go into the bank and get any information about any other accounts in the banks, you wouldn't get very far. Bank records are private records, not open to public inspection, except upon proper process.

Mr. Hagerty: They are all subject to——

Mr. Drewes: I can't continue my argument, if I am going to be interrupted every two minutes.

Mr. Hagerty: His investigators went there. They were given the bank records, and, furthermore, they are not private in that they are subject to subpoena, which he could have——

Mr. Drewes: Which I was going to bring in, if you would stop interrupting me, Mr. Hagerty.

Mr. Hagerty: I don't want you to mislead the jury.

Mr. Drewes: The bank records are private records and they are not open to inspection except upon regular process.

Consider that Lerman transaction which Mr. Hagerty says [1514] was an open transaction. Do you remember Mr. Whiteside testifying as to how he discovered that transaction? The \$5,000, you will remember, was charged to the capital account.

The Court: Credit.

Mr. Drewes: ——credited to the capital account in the Army & Navy Store. He was examining the books, and of course that kind of an entry is an important entry representing a source of capital, and so he decided to trace it through. Now, how did he trace it through? He had to get the deposit

slip for that particular day, and on the deposit slip were the numbers, of course, of the cashier's checks. So then he went to the American Trust Company, he got these records, which are the daily registers of cashier checks which are issued—this is for the 14th of May, this is for the 15th of May—and by reference to these two documents he discovered that these two cashier's checks had been purchased with these two personal checks of Mr. Lerman's. Then he goes to see Mr. Lerman and asks Mr. Lerman about the transaction, and he said, well, they were drawn for the purchase of suits from Mr. Leavy. Then he goes over to Mr. Leavy and gets the two so-called Goodman invoices which are in evidence. That, counsel would have you believe, is an open transaction. It would be very difficult, it seems to me, to cover a transaction to more confuse it than there was done in this particular case. [1515]

The invoices are Goodman printed invoices, made out by Mr. Leavy for suits sold allegedly to Lerman for Olender. That is not my conception of an open transaction. Quite to the contrary.

The record shows, you will recall, that Mr. Olender borrowed \$20,000 when, according to Schedule 4, he had \$60,000 in cash. And he borrowed \$10,000 when, according to the schedule, he had \$17,000 to \$19,000 in cash in the box. Mr. Hagerty would have you believe that that is the normal act or practice of business men for the purpose of establishing credit. Rubbish. Just plain rubbish. He had been in business at the same place, as I recall, since 1928. Why would he go to the bank and borrow those large

sums, for which he would have to pay interest, if he had such large sums of money available to him within a few moments at any time he wished? He wouldn't. You know he wouldn't. The answer is he didn't have any cash in the box.

Counsel has mentioned and commented on the character testimony that you have heard. Mr. Reinhard, and I believe Mr. Leavy, too, testified in that respect. That is evidence in the case that can be considered by you. But I ask you to keep in mind, too, that the offense with which this defendant is charged, is one by the very nature of which is carried out in the dark. No one knows about it. Men who have such an evil intent don't go around telling their friends that [1516] they are defrauding the United States of its taxes. So their friends don't know about it. And men who are engaged in illicit transactions in the black market are painstaking to leave no trail behind them and they don't discuss that with their friends either. So remember in considering character testimony there are some offenses which are committed in the light of the day and if they are committed at all it is a fair conclusion that people, including those who are closest to the individual, know about them. But that is not true of these particular offenses. Everyone is always surprised when a friend gets in trouble, trouble of this kind, because by its very nature, as I say, it is unknown, it is concealed.

Now Mr. Hagerty has made much to-do about the fact that Mr. Whiteside could not remember whether he had discussed the bonds with Mrs.

Olender when he was in Fresno, and Mr. Hagerty said to you that that was the biggest issue in the case. The biggest issue in the case was not the bonds. The biggest issue in the case was the \$75,000 allegedly in the vault in Fresno, and there is also the issue of the five gifts from the mother to the taxpayer. As Mr. Whiteside testified those were the matters with which he was primarily concerned. Small wonder under those circumstances that that particular matter of the bonds might not come to mind if there was such a discussion concerning them, that they were [1517] mentioned in the discussion, after the lapse of a great number of years.

Now Mr. Hagerty would have you believe, and for very obvious reasons, that the net worth approach to the measurement of income is a very indefinite thing, it is only an approximation, and, of course, he would have you believe that it is not to be trusted. It is an approximation. There is no question about that. But it is a very close approximation, and further the net worth measurement actually tends to understate the income of the taxpayer, and there is a very good reason for that. The reason, of course, is that it is very difficult to account for personal expenditures of an individual taxpayer. Many, many expenditures are made by all of us every day and of course there is just simply no accounting possible or contemplated for personal expenditures of many kinds, and so when the net worth approach is used the personal expenditure item is bound, in the nature of things, to be conservative, because all personal expenditures

cannot under any circumstances—rather, under all circumstances, be accounted for. So although it is an approximation, it is a close approximation and the normal tendency is to understate rather than to overstate the taxpayer's income.

Ladies and gentlemen, did counsel take this matter up with you? Did he try in any way to point out to you that our reconstruction from 1941 to 1944 was wrong in any way? He [1518] didn't. He didn't because he can't. By starting back to 1941, which is his opening, the taxpayer's, sworn net worth as of that date, which was long before many of the issues before you came into existence, adding the income which he reported, deducting the taxes, we come within \$20,000 of the beginning net worth which the Government seeks to establish in this case. Now if you charge him with living expenses, which indeed you must inasmuch as he is alive and his family is alive, the \$20,000 may entirely disappear. It depends upon what you charge him with—or in large part disappear.

The government has charged him with an understatement of \$46,000. Now that is substantially correct and has not been impeached in any way. Where is room for the \$22,000 in cash in the vault which the taxpayer would have you believe he had? Where is the room for the Goodman suits? Obviously there is no room for either item in that year.

Now, ladies and gentlemen, do you believe the defendant's story of the Goodman transaction? Don't you think that he bought those suits, as the record shows, early in January, 1944, sold them

quickly and put the money back in the vault? Do you think that he had trouble disposing of them when they were good as gold, according to Lerman's testimony? Do you believe that the whole \$20,550, the entire 822 suits less the 20 allegedly sold over the counter, were sold without a penny of profit, without a penny of gain? Do you believe [1519] that he had 322 suits left almost two years later when they were as good as gold in a short market? Do you believe that he had them when, by his own testimony, he didn't include them in his federal and state income tax returns as inventory of his store? Do you believe that the inventory price of \$24.50 was a mistake? Mr. Hagerty himself stated in court, in open court before you ladies and gentlemen of the jury, it was a mistake. Mr. Olender stated himself it was a mistake. Mr. Hagerty again this morning now says it is cost or market, which ever is lower. Do you believe all those things? I don't think you do.

Do you believe that he had \$72,000 in cash in the vault? Do you believe that when he arrives at that figure by adding together what are otherwise unexplainable receipts, for which he has no record, which cannot be verified, do you think the \$72,000 is any more valid than its component parts?

Do you think Schedule 4 is valid when one error, Government bonds shown as a withdrawal \$8,000, if increased to \$9,000 would end in a minus cash result, which is ridiculous?

Do you believe he had the money when the last item shows I. Magnin and the Gray Shop as with-

drawals from the box, where the taxpayer testified he never even heard of the accounts? Who paid them? Who took the cash out of the vault? If Mr. Olender never heard of the account! Do you believe [1520] all that?

Do you believe he had the money in the vault, in the safe deposit box, when the record shows he borrowed \$30,000 in 1945 and \$10,000 in 1946? Do you believe he got that money from the estate of his deceased father when the estate tax return shows conclusively that no gifts were ever made, when the taxpayer testified that no amended return was ever filed, when the record shows that no gift tax returns were ever filed? Do you believe that he got that money by way of gift from his father when the affidavit of Betty Olender shows that as of 1939 that she has no money either in savings account or in cash or in a safe deposit box? Do you believe she wouldn't know it? Do you believe she wouldn't know that she and her husband were the fortunate recipients of that kind of money? I don't think you believe it.

What about the mother's bonds? The taxpayer testified that he returned the interest on those bonds in 1947. He states that his mother did in 1946. But you have to rely on his word alone. He states that his mother returned interest in 1948, but that was after the investigation began. Mr. Ringo testified that when he took an inventory of the contents of the box the mother's name was written on the bonds, but he wasn't sure, as I recall his testimony, whether it was a piece of paper or in an envelope

or just what it was, but that the mother's name was on it. And that was in 1948. That [1521] was long after the investigation. Do you believe that these bonds were his or do you believe that they were his mother's? The mother's bank accounts, which are in evidence, the Bank of America and the Security First National Bank in Fresno, do not reflect any transactions which could possibly be in any way tied in to the purchase of \$20,000 worth of bonds of the mother. There is no evidence in either of those records that the mother ever withdrew any such sum for that purpose or for any other purpose, for that matter. Do you believe those bonds were hers or do you believe that they belonged to the taxpayer?

Do you believe the taxpayer when he comes into Court with a detailed mathematically contrived explanation of the Goodman transaction, when in July of 1947, he told Mr. Blanchard he knew nothing about it, when in 1948 he told Mr. Root he knew nothing about it, and when his own accountant, Ringo, was unable to straighten it out?

The taxpayer, the record shows, did not include on his sworn net worth statement his wife's bank account of over \$10,000.

He did not include one item of Asturias stock.

He testified that he got \$2,500 from Mrs. Foote, which she had saved up over a period of years, and put it in the vault. It is not in the vault and the record shows that she never had any such sum of money. There is no question about [1522] it.

The taxpayer testified that he had never done any

auditing, and the Government produces a sworn affidavit that he had done auditing work and the defendant promptly impeaches the affidavit: "I didn't read it." Do you believe him?

The defendant testified in this Court under oath that he had received five different gifts from his mother on specific dates that he identified, in specific amounts which he alleged. He stated that those sums of money were taken from the Fresno bank accounts of the mother, both of which he identified when I had him on the stand. He knew one was the Bank of America and the other was Security First National, and the record conclusively shows that those gifts were never so made. Two of them went into the account of his sister, where they stayed, and the other two went into commercial accounts, and one we can't identify, and don't know what happened to it. Do you think he got those gifts? I don't see how you can.

Now, ladies and gentlemen, the constitution provides that in this country every man who is charged with crime shall be tried by a jury of his peers. You have been selected more or less by chance and under our judicial system the responsibility is now yours to pass upon the guilt or innocence of this man. You are to decide whether or not he is guilty as charged beyond a reasonable doubt. And a reasonable [1523] doubt, as I pointed out to you in my opening remarks, is just that. It is a doubt based on reason. Is there any doubt in this case in your minds? I don't think there is. But if there is any doubt, is it a reasonable doubt? Or does it require

of you the acceptance of explanations which are just beyond the ordinary experience of men?

It has been said, and I think truly, that the revenues are the lifeblood of the republic. To the extent that one man cheats, we all have to pay, and to the extent that one man cheats and gets away with it, the laws which you and I passed through our duly elected representatives, are circumvented, are flaunted, and others are encouraged to do likewise. The responsibility which is now on your shoulders is a great one. You must consider this case dispassionately, on the record, and I am convinced that when you have there is only one conclusion that you can in good conscience reach, and that is that Milton Olender is guilty as charged.

Thank you.

The Court: Ladies and gentlemen, the arguments have now been concluded, and with the consent of the jury we will resume at 1:15, thus limiting your lunch hour by forty-five minutes. But at the same time I think that it will aid in facilitating the termination of the trial, in the light of the suggestion made by counsel on both sides earlier in the day that they desired the case to be submitted today. [1524]

I will instruct you then, ladies and gentlemen, at 1:15, and thereafter you will depart for your deliberations.

The same admonition to you, not to discuss the case.

(Thereupon an adjournment was taken until 1:15 o'clock p.m. this date.) [1524-A]

Saturday, October 10, 1952. 1:15 P.M.

Instructions to the Jury

The Court: Ladies and gentlemen of the jury, before taking up the formal instructions I desire to express to you the appreciation of the Court in conforming with the suggestions that I have made on time, particularly as to today. You forgave your luncheon period to be here, and it is always refreshing and very inspiring in trying a case or any case before a jury for we see in these Courts justice at work and sometimes from the bench we can view it a little more objectively than otherwise.

The purpose of a trial is to achieve justice. I indicated that to you at the very threshold, and now I now reiterate. We approach our task without harboring passion or prejudice for or against any party to this controversy.

Merely in passing and without reflecting on any counsel or upon the defense, some mention was made that possibly there were political influences present in this controversy. I can perceive none from the position of Judge.

This matter came before the Court on an indictment. The indictment was returned by the grand jury. I will hereafter make mention of the indictment. The defendant entered a plea [1525] of not guilty. He demanded a jury trial and under the constitution he is entitled to be tried by a jury of his peers. You represent twelve people who have been duly selected and impaneled to try him.

My avowed purpose and my duty under my oath

is to give this man, and every person who comes before me, a fair trial. I hope that I have achieved it.

You in turn must give him a fair trial from your view and approach the task as I have indicated without passion or prejudice, fear or favor.

You are to be governed solely by the evidence as unfolded in this case and not by sentiment or pity.

A verdict founded upon pity or sentiment or passion would be unfair both to the defendant and to the Government and to yourselves.

Both the public and the defendant have a right to demand and they do demand and expect that you will carefully and dispassionately weigh and consider the evidence in this case and the law as I give it to you and reach your verdict regardless of the consequences.

As the instructions unfold—it isn't possible to embody all of the law in a single instruction—some of these instructions that I read to you are those that you heard before in other criminal cases in which you may have participated. Others that you may hear are particularly [1526] applicable only to this case.

There are certain fundamental rules as we announced earlier in the trial that are applicable to any criminal case, and those rules I shall give you in addition to those otherwise presented.

I ask you to consider the instructions in the light and in harmony with every other instruction given, and to apply the principles enunciated to all the evidence outlined in the case.

I ask you to distinguish carefully between the arguments of counsel and the facts testified to by the witnesses and statements made by the attorneys during the course of the trial. If there is a variance between the two, you must, in arriving at your verdict, to the extent that there is such variance, consider only the facts testified by the witnesses, and you are to remember that statements of counsel in their arguments or representations are not evidence in the case. If counsel upon either side have made any statements in your presence concerning the facts of the case, you must be careful not to regard such statements as evidence and must look entirely to the proof in ascertaining what the facts are.

On the other hand, however, if counsel have stipulated or agreed to certain facts, and there have been stipulations entered into orally and in writing, you are to regard the facts [1527] so stipulated and agreed to by counsel as being conclusively proven.

In determining what your verdict shall be, you are to consider only the evidence before you. Therefore, any statement as to which an objection was sustained by the Court and any statement which was ordered stricken out by me, must be wholly left out of account and wholly disregarded.

At times throughout the trial the Court has been called upon to pass upon questions of whether or not certain offered evidence might properly be admitted. You may recall the times when we separated and you returned to the jury room during the course of the debate on certain points of law and the admissibility of certain evidentiary matter. On those

occasions the Court sought to rule, and you are not to be concerned with the reasons, if any reasons appear to you, for my ruling.

You must accept the same under the mandate of the law and my instructions to you.

As I have indicated to you, I am in turn bound by your findings on the facts. That is exclusively and wholly your province.

To that extent we work as a sort of a team.

However, in admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence, nor does it pass upon the credibility [1528] of the witness or the witnesses.

I further charge you, ladies and gentlemen, that if the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty under the law to adopt that interpretation which will admit of the defendant's innocence and reject that which points to his guilt.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case, than by that which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense. Consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of men, human beings, resolve the facts accord-

ing to deliberate and cautious judgment. And while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains, the Government is entitled to a verdict.

I charged you when you were sworn, or before you were sworn as jurors, and while you were being interrogated, that the fact that an indictment has been filed against the defendant is not to be considered by you as any evidence [1529] of his guilt. The indictment is merely a legal accusation charging a defendant with the commission of a crime. It is not, however, evidence against any defendant and does not create any presumption or inference of the defendant's guilt, and you are not to consider such fact in arriving at your verdict.

At the outset of the trial the Court had occasion, as well as counsel for the Government, to read in large measure the charging part of the indictment or the parts thereof. The indictment is broken up into four counts, and a count is, in effect, legal effect, a charge, or you might say: the first charge or the second charge. Legal terminology declares it shall be called a count. And the first count charges that on the 15th of March, 1946, that Milton Olender allegedly violated the law in the particulars therein set forth. The second count charges similarly that in that year on behalf of his wife he filed a fraudulent return. The third count pertains to the year 1947 individually on behalf of Milton Olender, and the fourth count refers to the return of his wife.

I shall not undertake to read the charging parts of the indictment nor the counts thereof. The same is on file in the Court and may be taken with you into the jury room, mindful, of course, that the indictment is merely a skeleton of the charges against the defendant, may not be [1530] considered by you as evidence, and is merely an outline of the charges.

The defendant, as I have reiterated, has entered a plea of not guilty, thereto.

I further indicate and charge you, ladies and gentlemen, that it is not necessary for the Government to prove that the defendant received income in the exact amount stated in the indictment or that the taxes due on his income were exactly as stated in the indictment. It is sufficient if you find beyond a reasonable doubt that the defendant received a substantial part of the income, which he is charged with receiving, and that he wilfully attempted to evade or defeat a substantial portion of the taxes alleged to have been due in the indictment.

The determination of a charge in a criminal case involves the proof of two distinct propositions. First that the crime charged was committed. Secondly that it was committed by the person accused therefor and on trial.

These two propositions and every essential and material fact necessary to them or to either of them must be established by the Government to a moral certainty and beyond a reasonable doubt.

In every crime there must exist a union or a joint operation of act and intent, and for a conviction

both elements must be proven to a moral certainty and beyond a [1531] reasonable doubt.

Such intent is merely the purpose or willingness to commit such act.

The defendant, Mr. Milton Olender, is presumed to be innocent of the charges made against him. This presumption of innocence attaches at the beginning of the trial. It has the weight and effect of evidence in the defendant's behalf and continues to operate in the defendant's favor throughout all stages of the trial.

When you finally retire to the jury room to deliberate upon a verdict, it becomes your duty to consider the evidence introduced in this case in the light of this presumption. This presumption is sufficient to acquit any defendant charged with a crime unless it is overcome by evidence that satisfies your mind to a moral certainty and beyond a reasonable doubt of the guilt of the accused, and unless you are not so satisfied it is your duty to find the defendant not guilty.

It is not necessary for the defendant to prove his innocence. The burden rests upon the prosecution to establish every element of the crime with which a defendant is charged to a moral certainty and beyond a reasonable doubt.

A reasonable doubt is what the term implies, a doubt based upon, founded upon reason. It means a doubt which is substantial, and not merely shadowy. It does not mean [1532] a doubt which is merely capricious or speculative. Neither does it mean a doubt born of reluctance upon the part of a

juror to perform an unpleasant duty or a doubt arising out of sympathy for a defendant or out of anything other than a candid consideration of all the evidence presented. It means a doubt which arises upon an impartial comparison and consideration of the evidence.

Without it being restated or repeated, you are to *that the* requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all instructions that are given to you.

Remember, ladies and gentlemen, that the defendant is entitled to any reasonable doubt, as I have defined it for you. But at the same time also remember that if you have no such doubt, the Government is entitled to a verdict.

Section 145(b) of the Internal Revenue Code makes any person guilty of crime who wilfully attempts in any manner to evade or defeat any income tax or the payment thereof.

To prove its case the Government must establish, first that this defendant on trial received taxable income which he failed to report on his return and that therefore his tax liability was greater than that shown on the return; and, secondly, that the failure to report the alleged additional [1533] income was pursuant to a wilful attempt to evade or defeat his income taxes, and those of his wife.

It is necessary that the Government establish both elements of its case beyond a reasonable doubt. Therefore, if you have a reasonable doubt that the defendant omitted any income from his return, the

defendant is not guilty of the offense charged, and even if you find that the defendant omitted a portion of his income from his return and that of his wife, the defendant is not guilty unless you are convinced beyond a reasonable doubt that in failing to report such income the defendant willingly attempted to defeat or evade his income taxes and those of his wife.

The mere failure of a taxpayer to report a portion of his taxable income is not a crime within the meaning of section, as I have indicated, unless it has been proven beyond a reasonable doubt that he wilfully attempted to defeat or evade his income taxes or those of his wife.

The Government has presented figures allegedly representing the defendant's unreported income for the years in question based upon its computation of the defendant's net worth at the end of the years 1944, 1945 and 1946, respectively. Now you are instructed to disregard these figures and computations unless you have found or are convinced beyond a reasonable doubt that the defendant engaged in profitable transactions or activities which he failed to [1534] record on his books.

If you find that the only transactions omitted from the books are such as resulted in no profit, there has been no proof of unreported income and you should acquit the defendant.

The Government charges that the defendant omitted from the Milton H. Olender net worth statement, U. S. Exhibit 1 prepared for the revenue agents by Mr. Ringo, his attorney and accountant,

certain stock of the Asturias Export-Import Corporation as well as his wife's savings account. According to the files taken from the Bureau of Internal Revenue at San Francisco the Bureau determined that as of December 31, 1947, the date as of which the net worth statement was prepared, the stock was worthless. If you find that the defendant honestly believed that neither the worthless stock nor his wife's savings account belonged on his net worth statement, the defendant is not guilty of any wilful concealment, and you may not infer from these omissions that the defendant harbored an intent to evade his taxes in these particulars.

The Government has also adduced evidence that the taxpayer consummated several transactions involving the use of large amounts of cash. I charge you that there is nothing unlawful about the use of large amounts of currencies. If you find that the defendant did not attempt to use these transactions in any manner to conceal assets, [1535] then you may not infer any intent on the part of the defendant to evade his taxes. The possession of money alone is not sufficient to establish net taxable income. But evidence of the possession of money and the expenditure of money may be considered as a part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income.

The Government further charges in part that the defendant in preparing the return for the partnership which sold the Riverdale Ranch reported the transaction as resulting in a loss for the partnership

when, under the applicable law the sale resulted in a capital gain. I charge you, ladies and gentlemen, that if you find that the defendant reported a loss from the sale of the ranch because he did not know, misunderstood or misinterpreted the law applicable in such a case, and not because he intended to evade his tax liability, the defendant is not guilty of any offense by reason of reporting a loss though in fact the transaction resulted in a capital gain.

The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of the taxpayer. But if no such method of accounting has been employed or if the method employed does not clearly [1536] reflect the income, a computation shall be made upon such basis and in such manner as in the opinion of the commissioner does fairly reflect the income.

The Government is authorized by law when the books are found to be inadequate to adopt a reasonable method of ascertaining income, and so in this case it has undertaken to find out what the defendant was worth at the beginning of the year and what he was worth at the end of the year, so as to show what he had accumulated as income in the meantime.

If at the end of the year a man has in his possession more property than he had at the beginning of the year, it goes without saying that he got it from some place, and unless he received it by gift or

inheritance or loan, it would seem that he got it by earning it, and that it was part of his income.

The Government has placed before you evidence relating to the defendant's net worth at the end of the years 1945 and 1946. A defendant's net worth for the given year is the difference between all of his assets and all of his liabilities. An increase in net worth for any year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year.

In order to compute the defendant's taxable net income by this method, you should add the defendant's living expenditures [1537] for that year and the income taxes which he paid during that year to the increase in net worth.

These expenditures should be added because they are not represented in assets which the defendant has accumulated and are not deductible expenses.

If you find that the defendant had an increase in net worth for the years 1945, 1946 and also had a business or calling of a lucrative nature, then there is no potent testimony that the defendant had income for those years, and if the amount exceeds exemptions and deductions, then that income is taxable.

You may recall that during the course of the trial Government counsel as well as defense entered into calculations as to net worth. In addition to that defense counsel, Mr. Lewis, offered an example or exemplar in order to show the arithmetical computations as they are ordinarily computed, and the instruction I have last given to you in substance and

effect outlines in a general way the net worth theory and how it is arrived at.

Evidence may be classified as direct or circumstantial.

With respect to direct evidence, witnesses testify directly of their own knowledge as to the main facts to be proved.

With respect to circumstantial evidence proof is given of facts and circumstances from which the jury may infer [1538] other connecting facts which reasonably follow according to the common experience of mankind. Circumstantial evidence shall be accorded treatment similar to that of direct evidence in ascertaining the facts of the case.

The net worth approach of proving unreported income is an attempt to prove unrecorded income by circumstantial evidence where the Government has no direct evidence of unreported income.

Circumstantial evidence may be a basis for a conviction only if the evidence excludes every reasonable possibility or hypothesis of innocence.

Proof of the circumstances that the defendant's acquisition of assets plus his non-deductible expenditures during a given year exceeded his reported income is not inconsistent with the theory that such excess expenditures may have been made from sources other than current income, that is to say, from cash and other assets accumulated prior to the starting period or the starting point. Therefore, unless the evidence has negated beyond a reasonable doubt the possibility that the excess expenditures may have been made from prior accumu-

lations, the Government has failed to prove that such expenditures constituted unreported taxable income.

I charge you, ladies and gentlemen, that you are the sole judges of the credibility of all of the witnesses, [1539] and that includes the expert witnesses, the accountants, as well as the other witnesses.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony or by evidence affecting his character for truth, honesty and integrity, or his motives or by contradictory evidence.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relationship which he bears to the Government or the defendant, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter which tends reasonably to shed light upon his credibility.

The good character of a person accused of crime when proven is itself a fact in the case. It is a circumstance tending in a greater or lesser degree to establish his innocence. It must be considered in connection with all of the facts and circumstances of the case and may be sufficient when so considered in itself to raise a reasonable doubt of the defendant's guilt.

But if after a full consideration of all the evidence adduced the jury believes the defendant to be guilty of the [1540] crime charged, they should so find notwithstanding proof of good character.

If you should find that there are discrepancies or inconsistencies existing in the testimony of any witness or between the testimony of any witness or witnesses or if you should find yourself disagreeing over various issues, real or apparent, you should then ascertain whether or not such discrepancies or inconsistencies or such points of difference affect the true issues in this case.

Examine such discrepancies or inconsistencies and such disputed points and ask yourself these questions:

How does the situation of this or that or the other discrepancy or matter in dispute affect the guilt or innocence of the defendant?

Regardless of what may be the truth concerning such discrepancies or inconsistencies, ask yourselves the main question:

Did or did not the defendant commit the charges as alleged in the indictment?

Is such discrepancy or such disputed point material to establish the main and material issue of fact as to the guilt or innocence of the defendant?

If they are not material, if the decision of the same is not necessary to enable you to arrive at a verdict of the guilt or innocence of the defendant, then such [1541] discrepancies or disputed points are immaterial and minor matters and you should

waste no further time in discussing or considering them.

A witness may be impeached by the party against whom he was called by contradictory evidence, by evidence that he or she has made at other times statements inconsistent with his present testimony.

If you believe that any witness has been impeached, then you will give the testimony of such witness such credibility, if any, as you may think it entitled to.

The defendant in this case has testified in his own behalf. That being so, you will determine his credibility according to the same standards applied to any other witness. These standards I have already pointed out to you.

You may also consider in this connection the interest the defendant may have in the case, his hopes and his fears, and what he has to gain or lose as the result of your verdict.

In determining the honesty of a defendant's intentions, you may weigh his own statements on the one hand as against the actions and conduct on the other hand.

There has been testimony in this trial which, if believed by you, would warrant you in finding that the defendant, Milton Olender, asserted at the trial a much more detailed recollection of transactions with George Goodman that he had admitted on earlier occasions. If [1542] you should find as a fact that such is the case, you are warranted in considering this fact in determining the truth or

falsity of the defense's account at the trial with respect to the Goodman transactions.

The defendant has testified that he did not include the Goodman suits in the inventory of December 31, 1944, as reported on his 1944 federal income tax return. I charge you that if you find that his failure so to do was intentional or wilful, then it was improper and unlawful.

Under the federal law the individual taxpayer making a return of his income tax to the United States certifies under the penalty of perjury that he believes that the figures included therein are true and correct. It was therefore unlawful for the defendant to omit the Goodman suits from the inventory reported on his return, if he did so with criminal intent to evade his tax liability.

However, the defendant in this case is not charged specifically with filing a false inventory as of December 31, 1944, and you cannot find him guilty of any of the offenses charged in this indictment because you find he was guilty of another offense not included in the indictment herein.

If you find that the defendant had no Goodman suits on hand as of December 31, 1944, then you need not consider this instruction. But if you should believe that the defendant did have suits, Goodman suits, on hand as of December 31, [1543] 1944, then you may consider defendant's failure to include them in his December 31, 1944, inventory in determining the question as to whether the defendant intended to evade and defeat income taxes as charged in the indictment.

I further charge you, caution you, ladies and gentlemen, that evidence of oral admissions of a defendant are to be received with caution. Evidence is to be estimated not only by its intrinsic weight but also according to the evidence which is in the power of one side to produce and the other side to contradict, and therefore if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a lesser number or against a presumption of law or other evidence satisfying your minds.

In other words, it is not the greatest number of witnesses that should control your judgment or your deliberations against a less number whose testimony does satisfy your minds and produces a moral certainty and moral conviction that they are telling the truth. It is upon the quality of the testimony rather than the quantity or [1544] the number of witnesses that you should act, provided it produces in your minds moral conviction and satisfies you of its truthfulness.

With respect to expert testimony, many accountants, expert and skilled in the art and science of accounting, have appeared before you, and in several instances they have differed in sharp and bold relief. As I have announced to you, you are to analyze their testimony, consider it in the light of

the facts of the case as they have unfolded it and in the light of their examination and cross-examination.

I further charge you that the computations made by an expert are for the convenience of both sides in presenting the case for your convenience.

You are not bound by the computations or other testimony of an expert witness, but you should give such testimony the weight to which you will determine it is entitled in the light of the other proof in the case and also with reference to your conclusion as to whether or not the facts on which the particular expert's testimony was based have been established by the necessary degree of proof.

I further charge you ladies and gentlemen that if a witness is shown knowingly to have testified falsely on the trial touching any material matter, that is, any fact which tends to prove or disprove the defendant's guilt or innocence, the jury has a right to distrust such [1545] witness' testimony in other particulars, and, in that case, you are at liberty to reject the whole of the witness' testimony, except insofar as he has been corroborated by other credible evidence or by facts and circumstances proved on the trial.

You are further instructed that when in the trial on charges of income tax evasion discrepancies between the defendant's return and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict.

If you find that the defendant herein had substantial taxable income for the year 1945 or 1946 or in both years, which he did not report on his income tax return, then you will find that there was a substantial amount of tax due to the United States Government for those years.

The same principle applies to the accounts involving the defendant's wife, Mrs. Betty Olender.

If the defendant intentionally handled his income so as to avoid making an accurate record of such income and then filed a return to his knowledge which substantially understated his income and the tax evasion motive played any part in such conduct, the offense charged may be made out even though the conduct may also have served other purposes, such as concealment of other wrongdoing. [1546]

Every person, except wage earners and farmers, liable to pay income taxes is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income and the deductions, credits and other matters required to be shown in any income tax return.

The duty to file this return is personal and it cannot be delegated.

Bona fide mistakes should not be treated as false and fraudulent. But no man who is able to read and write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statements which he signs whether prepared by him or somebody else.

Wilfulness is charged in the indictment. As you

may observe each count states that the defendant did wilfully and knowingly defeat and evade large parts of the income tax due and owing by him, et cetera. Now what does "wilfulness" mean as an essential element of the offense charged in each of the counts? "Wilfulness" means a specific wrongful intent to evade the tax. Therefore, unless you find beyond a reasonable doubt not only that a false return has been filed but that the defendant filed or caused the return to be filed with the knowledge that it was false and with corrupt and criminal intent to evade his obligation, you must acquit [1547] the defendant.

The gist of the offense charged in the indictment is a wilful attempt on the part of a taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt" as used in this law involves two elements, one, an intent to evade or defeat the tax and, secondly, some act done in furtherance of such intent.

The word "attempt" contemplates that the defendant had knowledge and understanding that during the years 1945 and 1946, or either of them, he had an income which was taxable and which he was required by law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such years and which he knew it was his duty to state in his return for such years.

There are various schemes, subterfuges and devices that may be resorted to evade and defeat the

tax. The one alleged in this indictment is that of filing a false and fraudulent return with the intent to defeat the tax or the tax liability. The gist of the crime consisted in wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt. That is to say it must be made with the intent to keep from the Government a tax imposed by the income tax law which it was the duty of the defendant to [1548] pay to the Government.

The attempt must be wilful. That is intentionally done with the intent that the Government shall be defrauded of the income tax due from the defendant.

The presumption is that a person intends the natural consequences of his acts and the natural presumption would be if a person consciously, knowingly or intentionally did not set up his income and thereby the Government was cheated or defrauded of taxes, that he intended to defeat the tax.

I further charge you that it is not necessary for the Government to offer direct proof of wilfulness. It is a rare case in which the defendant has said to a witness that he did certain acts with the purpose of evading his tax liability. In making your decision, therefore, as to whether or not the acts tending to conceal defendant's true tax liability was wilful, you may consider all the circumstances of the case, you may infer wilfulness from the kind of evasion, if any, which you find defendant com-

mitted, from his opportunity to know the true amount of his net income, and from such other facts which point to the existence or non-existence of a criminal state of mind in the defendant.

I further charge you, ladies and gentlemen, that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observations and knowledge to things that are put out in the open and are obvious to him, [1549] and say, "I have no knowledge of those facts." He must exercise such intelligence as he has, and, if the evidence shows that he intended to conceal tax liabilities from the Government, then of course, he was not acting in good faith.

This question of intent is a question you must determine for yourselves from a consideration of all the evidence.

It is for the Government to prove that the defendant did some act which tended to understate his tax liability, such as a failure to record a certain transaction or reporting a loss from a sale which in fact resulted in a taxable gain. In addition, as I have indicated to you, the Government must prove beyond a reasonable doubt that the act was wilfully done, that is, with criminal intent to defraud the Government of a tax which the defendant knew was due from him.

I have reached the concluding phases of my instructions, ladies and gentlemen. I only have one or two additional instructions and cautionary comments to make. The jury is composed of twelve

persons and, as you know, your verdict must be unanimous in a criminal case. All twelve jurors must agree before a verdict may be reached. And while your verdict should represent the opinions of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the [1550] jury system is to secure unanimity by a comparison of views and arguments among the jurors themselves. Each juror should listen with a disposition to be convinced to the opinions and arguments of the others. It is not intended that a juror should go to the jury with a fixed determination that the verdict shall represent his opinion of the case at that very moment. Nor is it intended that he should close his ears to the arguments of other jurors who are equally honest and intelligent with himself.

The attitude of jurors at the outset of their deliberations is important. It is seldom helpful for a juror upon entering the jury room to make an emphatic statement or opinion on the case or to announce a determination to stand for a certain verdict. When a juror does that at the outset, individual pride may become involved and he or she may hesitate to recede from an announced position even when later shown that it is incorrect.

You are not partisans. You are the judges, judges of the facts. You have the same responsibility in this court as I have. Your sole obligation, however, is to ascertain the truth from the facts as they are unfolded and to apply reason and common sense to the evidence in this case. You need not be great

logicians. You need not be great accountants. Apply to the facts in this case the same common sense and judgment that you would apply to the [1551] ordinary routine affairs of your own lives, in the light of the evidence as it unfolded and in the light of the testimony offered.

And I further charge you, ladies and gentlemen, that you will make a definite contribution to the administration of justice if you will arrive at an impartial verdict in this case.

The indictment contains four counts. Each count must be considered by you as a separate and several charge against the defendant, and according to such view as you may take of the evidence you shall return a verdict of either guilty or not guilty on each charge.

Your verdict, as I have already indicated, must be unanimous.

Further, as a caution to you and without intruding myself upon your particular functions, may I ask you not to concern yourselves with the matter of punishment of the defendant in the event of a verdict of guilty. The matter of punishment is for the Court alone and your province is to determine the guilt or innocence of the defendant.

The Clerk of the Court has prepared for your convenience a form of verdict:

Title of Court and cause—"We, the Jury, find Milton H. Olender, the defendant at the bar, as follows"— [1552] there is a blank as to count 1, blank as to count 2, blank as to count 3, blank as to count 4, and a line for the signature of the foreman.

In each space, allotted space provided, you may include therein when you so find, if you do find, either guilty or not guilty as it may appear to the jurors, in accordance with your findings.

When you retire to the jury room to deliberate, select one of your number as the foreman or forelady, and he or she will sign your verdict for you when it has been agreed upon, and he or she will represent you as your spokesman in the further conduct of the case in court.

I further caution you that if it becomes necessary for the jury to communicate with the Court during its deliberations or upon its return to the Court respecting any matter connected with the trial of the case, the jury should not indicate to the Court in any manner how the jury stands numerically or otherwise upon the issues submitted to the jury. This caution the jury should observe at all times after the case is submitted to it, and until the jury has reached a verdict.

Gentlemen, under the Rules of Criminal Procedure it is now your duty to note any exceptions in the record to any of the specific instructions I have given to this jury and the rule provides that it is to be done out of the presence of the jury. I will suggest, therefore, that we [1553] recess momentarily to my chambers. If you have any such exceptions, they may therein and there be noted by the reporter and we may then return to court.

The procedure shouldn't take very long, and, ladies and gentlemen, may I ask you during this procedural process and while the counsel are engaged

in making their records in connection with my instructions that you not leave the jury box. The case is not submitted to you until this motion has been performed, and, as I have indicated, it should not take very long.

(The following proceedings outside the presence of the jury.)

The Court: Take them up by number, as suggested in your proffered instructions, or by label on the instruction, giving a brief resume of what it may be. That would suffice for the record. There is no occasion to make any arguments. Just to protect your record. I think I covered in substance the general instructions offered. I may not, however.

Mr. Drewes: For the United States, your Honor, there are no exceptions. However, we think that it might be wise if the Court would instruct the jury that they may find on counts individually. Occasionally in the past it has caused a certain amount of trouble.

Mr. Hagerty: The defendant would object to the [1554] Government's supplemental instruction. I don't have the number on it but it starts out with "There has been testimony in this trial which if believed by you would warrant you in finding" and so forth, "That the defendant had a better memory of the Goodman deals at certain other times than others."

The Court: Based on the case—what is the case?

Mr. Hagerty: Based on *Interstates versus Horn-*

stein. I don't think the case supports it and I think it is an argumentative instruction.

The Court: The exception may be noted.

Mr. Hagerty: Then there is another instruction. I believe it is a supplemental instruction based upon an instruction given in the case of the United States versus Port in this Court, which I feel again is pure argument and there is no proper authority for its granting.

The Court: The exception may be noted.

Mr. Hagerty: There is another instruction wherein it starts that "Where there is a failure of the defendant to offer a proper explanation of his income"—or something—I don't think it is applicable to the facts of this case. I think there was an explanation so I object to it on that ground and also that it is argumentative. I don't know the number.

The Court: The exception may be noted. [1555]

Instruction number 5, based on Bell versus United States—that was the last one you referred to?

Mr. Hagerty: Yes, that's right, your Honor.

And then at this time I believe from a procedural matter or standpoint the only thing we have at this time is the exception to the instruction. We do not again enunciate our motions for judgment of acquittal or anything of that sort.

The Court: You might safeguard the record, and if you wish I will hear you.

Mr. Hagerty: Well, this time I would then again renew the motions made at the close of the

evidence in the trial, that is, for the granting of the mistrial based upon the admission of what we felt was prejudicial evidence in connection with the Laura Foote pension; also for the admission of the evidence from the witness Ringo based upon a violation of the confidential relationship existing between attorney and client.

The Court: That is also motion for judgment of acquittal?

Mr. Hagerty: And also a motion for judgment of acquittal.

The Court: Motions and each of them, severally and individually, are denied.

Mr. Hagerty: And at this time, as I also made a motion [1556] that failing the judgments and motions for mistrial, that the evidence should be stricken from the record. So for the record I again make that motion.

The Court: The motion to strike is denied.

Mr. Hagerty: And then of course the other motion I made, I believe it was the motion that judgment of acquittal be granted as to the year 1946 on the ground that there is no evidence of a substantial understatement of income.

The Court: The motion is denied in that respect.

Are there any motions that occur to you, Mr. Lewis?

Mr. Lewis: No.

The Court: Is the record clear?

Mr. Drewes: Just for the record, your Honor, in Court a day or so ago counsel for the defendant

in connection with the instruction based upon United States against Port, suggested certain changes in the terminology at that time. I understood that they had agreed that the instruction might be given.

Mr. Hagerty: That unfortunately, for the purpose of the record, was a misunderstanding between co-counsel on my side. I am sorry about it. I did at that time, at a quick glance, notice that wording and ask that it be stricken, but my brother counsel— [1557]

The Court: I recall that incident, and either counsel, either Mr. Lewis or Mr. Hagerty, did make a suggestion as to certain terminology in the instruction, as follows—

Mr. Hagerty: From “knowingly” to “with intent to”——

Mr. Shelton: “With criminal intent” are the words.

Mr. Hagerty: I saw the word “knowingly” wind up the end of the paragraph and immediately objected to it. Further study indicated that we couldn’t approve of the instruction despite the amendment, and I believe I spoke to Mr. Magee, the clerk, or we discussed something before the Court and as an oversight at the finish of my argument—I was going to call it to the Court’s attention again, but I didn’t this morning.

The Court: The language which was added appears at line 13, 14 of the proffered instruction and the following was added “with criminal intent to evade his tax liability.” In the initial instruction

offered by Mr. Drewes and Mr. Shelton the word "knowingly" was used without the added language. However, the record may show that by suggesting the additional terminology and language that defense counsel did not accede in the construction of the section nor in the construction of the proffered instruction nor in the giving thereof by the Court and did not waive any of their rights therein to hereafter subject the instruction to any attack under the law. So that preserves your rights. [1558]

(The following proceedings in the presence of the jury:)

The Court: Ladies and gentlemen, the court's attention has been directed to the form of verdict and I might add that the jury may arrive at a verdict of guilty or not guilty as to count 1; they may disagree as to count 2, as it may appear. In short, there need not be unanimity as to all of the counts. That is to say, they may agree as to count 3 of the counts and disagree as to count 1 of the counts, or any number thereof.

The case is now submitted to you ladies and gentlemen, and the Clerk of the Court if the counsel has had opportunity to examine the exhibits, the Clerk will bring to you all of the exhibits in the case, and you may now retire to your deliberations.

(Thereupon at 2:25 o'clock p.m. the jury retired to their deliberations.)

(The following proceedings had outside the presence of the jury at 5:12 o'clock p.m.)

The Court: I have received a communication from the jury, gentlemen:

“Please bring in transcript in regard to loan of \$30,000 and \$10,000 loans.”

I have requested the reporter to find the reference in the transcript and he has found the testimony of Mr. Carroll, [1559] both direct and cross.

Will you, counsel, indicate if that represents the reading?

Mr. Drewes: It does. I believe it is appropriate to include the first three lines on page 1226.

Mr. Lewis: If your Honor please, I just arrived. I haven't had the opportunity to completely peruse it.

The Court: May I ask counsel on all sides to be present or to have some representative present. In view of the demands made by the jury from time to time, it is very difficult to meet these demands, and that we have counsel available, in court, someone present, and it need not be you, Mr. Drewes, or you, Mr. Hagerty, but someone in court so we can get these things formulated.

All right.

Mr. Drewes: The direct examination consists of only four pages, your Honor, that covers this.

(The following proceedings had in the presence of the jury.)

The Court: The jury is present.

Ladies and gentlemen of the jury, your foreman has presented to the Court through the attaches of the Court a request as follows:

“Please bring in transcript in regard to loan of \$30,000 and \$10,000 loans.” [1560]

Under the rules the Court is unable to send into the jury room a copy of the transcript in whole or in part. When a request is made for a particular part of the transcript, the reporter is able to find it and we will have it read in open Court. Now the reporter has found this reference and may I ask you, Mr. Reporter, to read that reference to the jury.

(Whereupon the reporter read transcript pages 1222 through line 3 on page 1226.)

The Court: Any request for additional reading on that subject?

Mr. Hagerty: Yes, your Honor. I understood you to ask me if we felt——

The Court: If you had any additional material.

Mr. Hagerty: Yes, I think there is. Excuse me just a minute. Mr. Lewis has found these citations in here, the testimony beginning at page 863, volume 11 of the bookkeeper Vera Manger, in relation to this same transaction, beginning at line 10. I think we will pick up the thought from there, proceeding on through the following page, line 15, line 19.

Mr. Shelton: If your Honor please, may the Government hand up a copy to your Honor before that is read to see whether that is material on the question?

Mr. Drewes: The materiality is not apparent to me, your Honor. [1561]

The Court: I have read the suggested material

as indicated. I can't see any particular relevancy to this matter. I may be wrong.

Mr. Hagerty: The date is the same, your Honor, and it involves and it refers to the application for that loan and outlines the purpose.

Mr. Shelton: Maybe I am incorrect——

The Court: Page 863 at line 10:

(Reading from line 10, page 863, to line 14, of page 863.)

Mr. Lewis: The next item, your Honor, is the item involved——

The Court: (Reading on page 863, from line 14, page 864, line 15.)

Mr. Lewis: Now just go to the end of that page.

The Court: (Reading page 864, line 16, to line 25, page 864.)

Mr. Lewis: In other words, the application shows that the money was borrowed for purchases, uniforms, and he sent out checks and deposited the Government security in order to have the money in case those checks were cashed.

The Court: Well, in any event, however, the record is approached, loans were made on the dates in question and security was posted in the amounts indicated. That is the record.

Mr. Hagerty: Yes, your Honor. [1562]

The Court: Are there any further matters now?

Mr. Drewes: None on behalf of the Government, your Honor.

Mr. Hagerty: No, that completes the picture of the transaction, your Honor.

The Court: Does that satisfy the request of the foreman?

The Foreman: Yes, sir.

The Court: I suggest you return then for further deliberations.

(The jury returned for further deliberations at 5:32 p.m.)

(5:42 p.m., the following proceedings in the presence of the jury.)

The Court: Ladies and gentlemen of the jury, did you reach a verdict?

The Foreman: Yes, your Honor.

The Court: Would you present the verdict to the marshal, please.

Read the verdict, Mr. Clerk.

The Clerk: Ladies and gentlemen of the jury, hearken unto your verdict as it shall stand recorded:

“We, the jury, find as to Milton H. Olender, the defendant at the bar, as follows:

“Guilty as to count 1, guilty as to count 2, guilty as to count 3, guilty as to count 4. Signed Edward C. Chew, [1563] Foreman.”

So say you all?

(Affirmative reply.)

The Court: You wish the jury polled?

Mr. Hagerty: Yes, your Honor.

The Court: Would you poll the jury, Mr. Clerk?

(Thereupon the jury was polled, response unanimously in the affirmative.)

The Clerk: The verdict is unanimous, your Honor.

The Court: The verdict here may be entered of record and judgment of conviction entered thereon.

Ladies and gentlemen of the jury, after the passage of some four weeks in the trial of this case I think it only fair that the Court indicate to you that your verdict is the inevitable result of a fair and dispassionate review of the evidence, and if I had been permitted to join with you I would have joined in the verdict. I, as a Court recognize the difficulty attendant upon a body of twelve persons reviewing a record of this magnitude. It has not been an easy job for you, and I wish to compliment you, as the Court and on behalf of these Courts, for your constructive effort in the administration of justice.

The jury is excused until further notice.

(The following proceedings outside the presence of the jury.) [1564]

The Court: Will the defendant arise. Have you anything to say at this time why judgment and sentence should not be pronounced?

Mr. Hagerty: Yes, your Honor. At this time we feel that we would like to make certain motions in reference to a new trial on the various grounds that we can by statute. We should also like to make a motion for judgment for acquittal notwithstanding the verdict. That's all the motions I make right at this time, your Honor.

The Court: Counsel?

Mr. Drewes: I have no statements to make opposing the motions.

The Court: The matter may stand over then until the following week in order to provide counsel an interval in which to make the motions indicated.

Mr. Hagerty: At this time too we would like to ask that the defendant be permitted to remain on bail pending the outcome of the determination of those motions.

The Court: What is the bail? What is the amount?

The Defendant: \$1,000.

The Court: Do you have any objection?

Mr. Drewes: Submit the matter, your Honor.

The Court: I have no objection if the defendant remains at large pending a determination of the motions. He is a resident, I assume, of many years in Oakland? [1565]

Mr. Hagerty: Yes, your Honor. We feel that as far as bail is concerned, it is adequate since he is a family man, owns his own home, has his own business.

The Court: Yes, I think that is adequate. Will you indicate a date to the Clerk?

(Thereupon followed discussions between Court and counsel relative to setting of date on hearing for motions.)

The Clerk: October 14th on hearings for motions.

(Thereupon the Court adjourned.) [1566]

Proceedings on Judgment and Sentence

Before Judge George B. Harris

Monday, November 10, 1952, 9:30 A.M.

(At the time of judgment and sentence the following were present: the defendant, with his counsel, Emmet F. Hagerty, Esq., and John V. Lewis, and Assistant United States Attorney Robert J. Drewes.)

The Clerk: United States vs. Olender for judgment.

The Court: This is the time for the pronouncement of judgment and sentence in the matter of United States vs. Milton H. Olender. Does the defendant at this time have anything to say why judgment and sentence should not be pronounced against him?

Mr. Hagerty: No, there is no legal cause, your Honor, and I believe your Honor is in possession of the presentence report, which is in the nature of a motion for probation.

The Court: Yes, I have, Mr. Hagerty, the presentence report and the recommendations, the letters from the governmental agency, the revenue service. The report is rather comprehensive and embodies a number of letters written on behalf of Mr. Olender. It appears that Mr. Olender has written to his many friends requesting that they submit on his behalf letters of commendation or recommendation. I understand that there are many letters filed with the probation office. I have read many of them.

The recommendation submitted to this court is [1*] against probation, and after a very thorough review of the file as well as the trial I must agree with the recommendation. Accordingly, it is the duty of the Court to sentence the defendant. Heretofore, after a trial by jury, the defendant was convicted on four counts in an indictment. The trial was a lengthy one, and according to the report before me, the investigation antedating the trial was a very lengthy and burdensome one.

Milton Olender, it is the judgment and sentence of this Court that on the first count of the indictment under which you have been heretofore convicted, you be confined in a federal penitentiary for the term of three years and pay a fine to the government in the amount of \$10,000.

As to the second count of said indictment under which you have been heretofore convicted, similarly it is the judgment and sentence of this Court that you be confined in a federal penitentiary for the term of three years and pay a fine to the United States Government in the amount of \$10,000.

With respect to the third count, similarly, it is the judgment and sentence of this Court that you be confined in a federal penitentiary for the term of three years and pay a fine to the government in the amount of \$10,000, all sentences on each of said counts, and all of said counts to run concurrently and not consecutively.

With respect to the fourth count, it is the judgment of [2] this Court that you pay a fine to the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

United States Government in the amount of \$10,000, which said sentences shall run consecutively with and not concurrent; that is to say, the total sentence is three years confinement in a federal penitentiary and a fine to be paid to the United States Government in the sum of \$20,000. Do you want a stay?

Mr. Hagerty: Yes. At this time we would like to serve a notice of appeal and serve copies on the United States Attorney, and we would ask for a stay of execution in reference to the fines pending the determination of the appeal. We would also ask your Honor to set bail on appeal to permit the defendant to remain out of custody.

Mr. Drewes: We will submit the matter, your Honor.

The Court: To the fines, I will grant a fifteen day stay. You have filed your notice of appeal, have you?

Mr. Lewis: Yes.

The Court: Do you have any suggestion as to bail, Counsel?

Mr. Drewes: No, your Honor.

The Court: What is the bail now?

Mr. Lewis: The bail is \$1,000. The Government has, I would say, approximately three or four hundred thousand dollars worth of property which the Government has levied on, and the defendant has appeared voluntarily in every case. I think that should be taken into consideration by your Honor in letting him on bail. I do not think the defendant is going to run away. [3]

The Court: There has been a lien levied upon

his property, as I read the record. Therefore, I think the bail should be in an amount proportionate to the amount of the security the Government has on the lien. I will allow bail pending determination of the appeal in this case in the amount of \$2,500.

Mr. Hagerty: Thank you, your Honor.

The Court: I grant a fifteen-day stay. [4]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case, or true copies thereof, and that they constitute the record on appeal as designated by the attorneys herein:

Indictment.

Minutes of March 11, 1952.

Minutes of April 8, 1952.

Minutes of September 19, 1952.

Minutes of September 22, 1952.

Minutes of September 23, 1952.

Minutes of October 8, 1952.

Minutes of October 10, 1952.

Minutes of October 14, 1952.

Plaintiff's instructions given.

[Endorsed]: No. 13658. United States Court of Appeals for the Ninth Circuit. Milton H. Olender, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 12, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13658

MILTON H. OLENDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STIPULATION RELATIVE TO EXHIBITS
AND RECORD ON APPEAL

It Is Hereby Stipulated by and between counsel for the respective parties hereto, that all of the Government Exhibits 1 through 66 inclusive, including those marked for identification, and all of defendant's Exhibits A through AQ, inclusive, including those marked for identification, need not be set forth in the Reporter's Transcript or in the printed

record on appeal, but the same shall be deemed to be included therein as part of said transcript and printed record on appeal with the same effect in all respects as if included in and set forth in said record on appeal; and

It Is Hereby Further Stipulated, that all of the Exhibits of both the plaintiff and defendant herein, including those marked for identification, together with the record on appeal, be transmitted by the Clerk of the District Court to and filed in the office of the Clerk of the United States Court of Appeals for the Ninth Circuit, and that such of said designated Exhibits that any of the parties to the above action may deem material, may be printed in the Brief, or Briefs, of such parties or in an appendix or supplement thereto or described in said Briefs with like force and effect as if said designated Exhibits were set forth in full in said Reporter's Transcript or printed record on appeal.

Dated: January 7th, 1953.

CHAUNCEY TRAMUTOLO,
United States Attorney.

By /s/ ROBERT J. DREWES,
Assistant United States At-
torney.

/s/ LEO R. FRIEDMAN,
Attorney for Defendant,
Milton H. Olender.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ /WM. HEALY,

s/ WALTER L. POPE,
United States Circuit Judges.

[Endorsed]: Filed January 14, 1953.

[Title of Court of Appeals and Cause.]

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED UPON ON APPEAL AND
DESIGNATION OF RECORD ON APPEAL

Comes now appellant above named and advises the Court that on his appeal he intends to rely upon each and all of the following points, to wit:

1. Insufficiency of the evidence to establish each or any of the charges or to support the verdicts and/or judgments on each of the charges contained in the indictment.

2. That the District Court and the Judge thereof erred in denying appellant's motion at the conclusion of all the evidence in the case for judgments of acquittal as to each count of the indictment.

3. That the verdict as to each count of the indictment is contrary to the weight of the evidence.

4. That the verdict as to each count of the indictment is not supported by substantial evidence.

5. That the Court erred in admitting in evidence on behalf of the Government and over the objection of appellant, the testimony of Government's witness Charles R. Ringo.

6. That the Court erred in denying appellant's motion to strike out all of the testimony of Government's witness Charles R. Ringo and of all Exhibits introduced in evidence during the testimony of said witness.

7. That the Court erred in sustaining an objection of the Government to the following question asked of the witness Charles R. Ringo by appellant on the voir dire examination of the witness Charles R. Ringo, to wit: "And at that time the relationship of attorney and client was set up?"

8. That the Court erred in denying the offer and request of appellant during the voir dire examination of Government's witness Charles R. Ringo, to then put the defendant and appellant on the stand in order that he could testify as to his version and understanding of the relationship existing between Charles R. Ringo and appellant.

9. That the Court erred in admitting in evidence over the objection of appellant, United States Exhibit No. 45.

10. That the Court erred in admitting in evidence over the objection of appellant, the testimony of the witness Melbourne C. Whiteside, a Government witness, to the effect that as a result of checking the bank records in Fresno and discussions had

with Mrs. Molly Olender, he had made a determination that six items claimed by appellant to be sums of money made to him as a gift by his mother, were not in fact made.

11. That the Court erred in admitting in evidence over the objection of appellant, United States Exhibit No. 55.

12. That the Court erred in instructing the jury as follows:

“There has been testimony in this trial which, if believed by you, would warrant you in finding that the defendant, Milton Olender, asserted at the trial a much more detailed recollection of transactions with George Goodman that he had admitted on earlier occasions. If you should find as a fact that such is the case, you are warranted in considering this fact in determining the truth or falsity of the defense’s account at the trial with respect to the Goodman transactions.”

13. That the Court erred in instructing the jury as follows:

“You are further instructed that when in the trial on charges of income tax evasion discrepancies between the defendant’s return and his actual income are indicated by the Government’s proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict.”

14. That the Court erred in admitting in evidence over the objection of appellant, the consent

judgment rendered in the OPA suit brought against appellant.

Appellant Olender designates the entire record, including the opening and closing arguments of the Government to the jury but omitting therefrom defense counsel's argument to the jury, be printed in that he believes that all thereof is necessary to fully support and present his appeal and that the Exhibits introduced in the trial and which have been sent to the Clerk of this Court of Appeals be considered and that the stipulation relative to said Exhibits and their use on this appeal on file in the above Court, be printed in the record.

Dated: January 15th, 1953.

/s/ LEO R. FRIEDMAN,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 15, 1953.



